



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

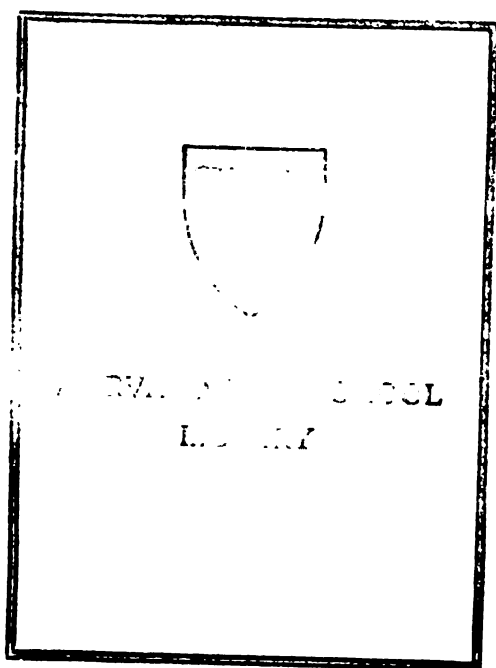
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 078 431 996









3  
c

**REPORTS**

**OF**

**CASES ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT**

**OF THE**

**STATE OF KANSAS.**

---

**REPORTER:**  
**LLEWELLYN J. GRAHAM.**

---

**VOL. LXXXII.**

**MARCH 12, 1910—JUNE 11, 1910.**

o

---

**STATE PRINTING OFFICE,**  
**TOPEKA, 1910.**

2039

ENTERED ACCORDING TO ACT OF CONGRESS, IN THE YEAR 1910, BY

LLEWELLYN J. GRAHAM, Reporter,

*For the benefit of the State of Kansas,*

In the office of the Librarian of Congress, at Washington.

SEP 23 1910

## JUSTICES OF THE SUPREME COURT

DURING THE PERIOD COVERED BY THIS VOLUME.

---

### CHIEF JUSTICE:

HON. WILLIAM A. JOHNSTON, . . . Minneapolis.

### JUSTICES:

HON. ROUSSEAU A. BURCH, . . . . . Salina.

HON. HENRY F. MASON, . . . . . Garden City.

HON. CLARK A. SMITH, . . . . . Cawker City.

HON. SILAS W. PORTER, . . . . . Kansas City.

HON. CHARLES B. GRAVES, . . . . . Emporia.

HON. ALFRED W. BENSON, . . . . . Ottawa.

---

### OFFICERS:

*Clerk,* . . . DELBERT A. VALENTINE, Clay Center.

*Reporter,* LLEWELLYN J. GRAHAM, Topeka.

*Librarian,* JAMES L. KING, . . . Topeka.

*Atty.-Gen.,* FRED S. JACKSON, . . . . . Eureka.

---

### SESSIONS:

THE Supreme Court meets for the hearing of causes in every month but August and September, each session beginning on the first Monday of the month, except the January and July sessions, which begin on the first Tuesday of the month.

# **JUDGES OF THE DISTRICT COURTS** **AT THE PRESENT TIME (JULY 1, 1910.)**

<i>Dist.</i>		<i>Residence.</i>
1.....	HON. WILLIAM DILL.....	Leavenworth.
2.....	HON. WILLIAM A. JACKSON.....	Atchison.
3.....	HON. ALSTON W. DANA.....	Topeka.
4.....	HON. CHARLES A. SMART.....	Ottawa.
5.....	HON. FREDERICK A. MECKEL.....	Emporia.
6.....	HON. JOHN C. CANNON.....	Mound City.
7.....	HON. JAMES W. FINLEY.....	Chanute.
8.....	HON. ROSWELL L. KING.....	Marion.
9.....	HON. CHARLES E. BRANINE.....	Newton.
10.....	HON. JABEZ O. RANKIN.....	Paola.
11.....	HON. CORB A. McNEILL.....	Columbus.
12.....	HON. JOHN C. HOGIN.....	Belleville.
13.....	HON. GRANVILLE P. AIKMAN.....	El Dorado.
14.....	HON. THOMAS J. FLANNELLY.....	Independence.
15.....	HON. RICHARD M. PICKLER.....	Smith Center.
16.....	HON. ELMER C. CLARK.....	Oswego.
17.....	HON. WILLIAM H. PRATT.....	Phillipsburg.
18.....	HON. THOMAS C. WILSON.....	Wichita.
19.....	HON. CARROLL L. SWARTS.....	Winfield.
20.....	HON. JERMAIN W. BRINCKERHOFF.....	Lyons.
21.....	HON. SAM KIMBLE .....	Manhattan.
22.....	HON. WILLIAM I. STUART.....	Troy.
23.....	HON. JACOB C. RUPPENTHAL.....	Russell.
24.....	HON. PRESTON B. GILLETT.....	Kingman.
25.....	Div. No. 1, HON. EDWARD L. FISCHER.....	Kansas City.
	Div. No. 2, HON. LEWIS C. TRUE.....	Kansas City.
26.....	HON. BENJAMIN A. MASON.....	Salina.
27.....	HON. GORDON L. FINLEY.....	Dodge City.
28.....	HON. WILLIAM H. THOMPSON.....	Garden City.
29.....	HON. CHARLES E. LOBDELL.....	Larned.
30.....	HON. CHARLES W. SMITH.....	Stockton.
31.....	HON. ROBERT C. HEIZER.....	Osage City.
32.....	HON. OSCAR RAINES .....	Oskaloosa.
33.....	HON. OSCAR FOUST.....	Iola.
34.....	HON. ARTHUR FULLER .....	Pittsburg.

JUDGE OF THE COURT OF COMMON PLEAS OF WYANDOTTE COUNTY,  
HON. HUGH J. SMITH, Argentine.

---

OFFICERS OF UNITED STATES COURTS,  
DISTRICT OF KANSAS.

---

## JUDGES OF THE CIRCUIT COURT OF APPEALS:

HON. WALTER H. SANBORN.....St. Paul, Minn.  
HON. WILLIS VANDEVANTER.....Cheyenne, Wyo.  
HON. WILLIAM C. HOOK.....Leavenworth, Kan.  
HON. ELMER B. ADAMS.....St. Louis, Mo.

## JUDGE OF THE DISTRICT COURT:

HON. JOHN C. POLLOCK.....Kansas City.

## DISTRICT ATTORNEY:

HON. HARRY J. BONE.....Ashland.

## MARSHAL:

HON. WILLIAM H. MACKEY, JR....Junction City.

## CLERK OF THE CIRCUIT COURT:\*

GEORGE F. SHARITT.....Topeka.

## CLERK OF THE DISTRICT COURT:\*

MORTON ALBAUGH.....Kingman.

---

The terms of the CIRCUIT COURT are held as follow:

FIRST DIVISION: At *Leavenworth*, on the first Monday of June; at *Topeka*, on the fourth Monday of November; at *Kansas City*, on the second Monday of January and the first Monday of October (no jury in October).

SECOND DIVISION: At *Wichita*, on the second Monday of March and the second Monday of September.

THIRD DIVISION: At *Fort Scott*, on the first Monday of May and the second Monday of November.

---

The terms of the DISTRICT COURT are held as follow:

FIRST DIVISION: At *Topeka*, on the second Monday of April; at *Leavenworth*, on the second Monday of October; at *Kansas City*, on the second Monday of January and the first Monday of October (no jury in October); at *Salina* (by consent or special order), on the second Monday of May.

SECOND DIVISION: At *Wichita*, on the second Monday of March and the second Monday of September.

THIRD DIVISION: At *Fort Scott*, on the first Monday of May and the second Monday of November.

---

\* Clerk's office, first division, at Topeka; second division, at Wichita; third division, at Fort Scott.

## TABLE OF CASES

## REPORTED IN THIS VOLUME.

## A.

Abmeyer, Bank v.....	283
Ætna Loan Association v. Hobson.....	857
Ætna Mill Co., Maib v.....	660
Ætna Mill Co. v. Kramer.....	679
Aherne v. Investment Co.....	435
Allen County, Board of Education v.....	782
Allen County, Hunt v.....	824
Alstrum v. Railway Co.....	858
Altoona State Bank v. Hart.....	398
Andrew, Investment Co. v.....	550
Anthony, Stevens v.....	179
Arneal, Scott v.....	208
A. T. & S. F. Rly. Co., Bowers v.....	95
A. T. & S. F. Rly. Co., Cloud v.....	851
A. T. & S. F. Rly. Co., Coon v.....	311
A. T. & S. F. Rly. Co., Leslie v.....	152
A. T. & S. F. Rly. Co., Milling Co. v.....	256
A. T. & S. F. Rly. Co. v. Spaeth.....	861

## B.

Baehler, Puckett v.....	726
Bailey, Riverside v.....	429
Bailey v. Gas Co.....	746
Baker, Himmelwright v.....	569
Baker v. Lane.....	715
Baldrige v. Centgraf.....	240
Bank, Brooks v.....	597
Bank, Dody v.....	406
Bankers Surety Co., Bank v.....	691
Bank, Shale v.....	649
Bank v. Abmeyer.....	283
Bank v. Hart.....	398
Bank v. Northup.....	638
Bank v. Varner.....	691
Barbour v. Rosedale.....	213
Barnes, Chase v.....	28
Barton, Lewis v.....	163
Beadle, Wagner v.....	468
Beaty, Milburn v.....	207
Beekman v. Trower.....	327
Bellamy, King v.....	301
Bellevue, Elliott v.....	78
Belt Fuel Co., Brick Co. v.....	752
Benefit Association, Mosiman v.....	670
Berry, Hotham v.....	412
Bethany Hospital Co. v. Philippi.....	64
Bettelheim, Brice v.....	500

# TABLE OF CASES.

vii

Biblical Institute v. Minard.....	338
Bitner, Doty v.....	551
Blair v. Blair.....	464
Board of Education v. Allen County.....	782
Board of Comm'rs of Allen Co., Board of Education v.....	782
Board of Comm'rs of Allen Co., Hunt v.....	824
Board of Comm'rs of Butler Co., Mosier v.....	708
Board of Comm'rs of Butler Co., Nelson v.....	364
Board of Comm'rs of Ellsworth Co., Salt Co. v.....	203
Board of Comm'rs of Johnson Co., Hill v.....	813
Board of Comm'rs of Lyon Co., Wolf v.....	516
Board of Comm'rs of Rawlins Co. v. Smith.....	857
Board of Comm'rs of Scott Co., Railroad Co. v.....	795
Board of Comm'rs of Wilson Co., Mikesell v.....	502
Board of Comm'rs of Wilson Co., School District v.....	806
Board of Comm'rs of Wyandotte Co., Gunning v.....	218
Board of Comm'rs of Wyandotte Co., Mendenhall v.....	218
Boiler Works, Kamera v.....	432
Bowen, Gambill v.....	840
Bowers v. Railway Co.....	95
Bowland v. McDonald.....	84, 357
Bowlus v. Iola.....	774
Branstool, Gibson v.....	59
Brecount, The State v.....	195
Bressler v. McVey.....	341
Brice v. Saylor.....	500
Brick Co., Pilgrim v.....	114
Brick Co. v. Gas Co.....	752
Brooks v. Bank.....	597
Brown, Corcoran v.....	190
Brown v. Insurance Co.....	442
Brown v. Wilkerson.....	553
Brumbaugh v. Wilson.....	53
Building & Loan Association v. Hobson.....	857
Butler County, Nelson v.....	364
Butler County, Mosier v.....	708
Butler v. Butler.....	130

## C.

Capell v. Dill.....	652
Caspar v. Lewin.....	604
Cauble v. Light Co.....	541
Cemetery Association v. Hanslip.....	20
Centgraf, Baldrige v.....	240
Chance, The State v.....	388, 392
Chanute Brick Co. v. Gas Co.....	752
Chase v. Barnes.....	28
Chumos, Marks v.....	562
City of Anthony, Stevens v.....	179
City of El Dorado, Matheney v.....	720
City of Goodland v. Nation.....	200
City of Iola, Bowlus v.....	774
City of Newton v. Toevs.....	15
City of Olathe, Edson v.....	4
City of Rosedale, Barbour v.....	213
Cloud v. Railway Co.....	851
Coal Co., Patton v.....	81
Cold Storage Co., Sheppard v.....	509



Colean v. Johnson.....	655
Conklin, Kruse v.....	358
Comm'rs of Allen Co., Board of Education v.....	782
Comm'rs of Allen Co., Hunt v.....	824
Comm'rs of Butler Co., Mosier v.....	708
Comm'rs of Butler Co., Nelson v.....	364
Comm'rs of Ellsworth Co., Salt Co. v.....	203
Comm'rs of Johnson Co., Hill v.....	813
Comm'rs of Lyon Co., Wolfe v.....	516
Comm'rs of Rawlins Co. v. Smith.....	857
Comm'rs of Scott Co., Railroad Co. v.....	795
Comm'rs of Wilson Co., Mikesell v.....	502
Comm'rs of Wilson Co., School District v.....	806
Comm'rs of Wyandotte Co., Gunning v.....	218
Comm'rs of Wyandotte Co., Mendenhall v.....	218
Consolidated Fuel & Light Co., Cauble v.....	541
Consolidated Fuel & Light Co., Prunty v.....	541
Coon v. Railway Co.....	311
Cooper v. Rhea.....	109
Contracting Co., McCullough v.....	734
Corcoran v. Brown.....	190
Cramer, Aherne v.....	435
C. R. I. & P. Rly. Co., Alstrum v.....	858
C. R. I. & P. Rly. Co., Duncan v.....	230
C. R. I. & P. Rly. Co., Fleeman v.....	574
C. R. I. & P. Rly. Co., Smith v.....	136
Cross, Wood v.....	215
Culp, Wall v.....	860

## D.

Davis v. Nation.....	410
Day v. Pipe Line Co.....	861
Deal, Hulsman v.....	518
Defenbaugh, Harris v.....	765
Delautre, Hughes v.....	548
Dill, Capell v.....	652
Dody v. Bank.....	406
Dolley, The State v.....	533
Doty v. Bitner.....	551
Doty v. Maddux.....	416
Duncan v. Railway Co.....	230
Duphorne v. Moore.....	159

## E.

Edson v. Olathe.....	4
El Dorado, Matheney v.....	720
Elevated Rld. Co., Karner v.....	842
Elevator Co., Maib v.....	660
Elevator Co. v. Kramer.....	679
Ellis, Hutto v.....	445
Elliott v. Bellevue.....	78
Ellsworth County, Salt Co. v.....	203
Epting, O'Neil v.....	245
Eyman, The State v.....	777

# TABLE OF CASES.

ix

## F.

Falkenberg, Stewart v.....	576
Farington v. Modern Woodmen.....	841
Farmers Bank, Shale v.....	649
Fee v. Richardson.....	190
Fire Insurance Co., Funk v.....	525
Fire Insurance Co., Smith v.....	697
First National Bank v. Abmeyer.....	283
First National Bank v. Northup.....	638
Fisher, Lemaster v.....	280
Fleeman v. Railway Co.....	574
Fliege v. Railway Co.....	147
Fredonia Gas Co., Bailey v.....	746
Fredonia Gas Co., Wheeland v.....	862
Fuel & Light Co., Cauble v.....	541
Fuel & Light Co., Prunty v.....	541
Fuel Co., Brick Co. v.....	752
Funk v. Insurance Co.....	525
Fuqua v. Railroad Co.....	315

## G.

Gambill v. Bowen.....	840
Garlock, Martin v.....	266
Garrett v. Loftus.....	556
Garrett v. Minard.....	338
Garton, Howell v.....	495
Gas & Oil Co., Elliott v.....	78
Gas Co., Bailey v.....	746
Gas Co., Brick Co. v.....	752
Gas Co., Howerton v.....	367
Gas Co., Wheeland v.....	862
G. C. G. & N. Rld. Co. v. Nation.....	345
G. C. G. & N. Rld. Co. v. Scott County.....	795
German American Insurance Co., Jerrils v.....	320
Gibson v. Branstool.....	59
Gilbert v. Grubel.....	476
Goertz, Van Hall v.....	142
Goodland v. Nation.....	200
Greenlees, McDougle v.....	440
Gregory v. Kennedy.....	565
Grubel, Gilbert v.....	476
Gunning v. Wyandotte County.....	218

## H.

Hamilton, Patton v.....	81
Hamilton, Yurann v.....	528
Hampe v. Sage.....	728
Hanslip, Cemetery Association v.....	20
Hargis, Lake v.....	711
Harrell, Neef v.....	554
Harris v. Defenbaugh.....	765
Hart, Bank v.....	398
Hawkins v. Windhorst.....	522
Hayde, McCullough v.....	734
Hays Land Co., Smith v.....	539

Heneks v. Young.....	860
Hetzer, Puckett v.....	726
Hevel, Matthewson v.....	134
Hill v. Johnson County.....	813
Himmelwright v. Baker.....	569
Hobson, Loan Association v.....	857
Hollingsworth v. Telegraph Co.....	472
Holt v. Wilson.....	268
Home Insurance Co., Brown v.....	442
Home Insurance Co., Rowland v.....	220
Hopper v. Learned.....	859
Hospital Co. v. Philippi.....	64
Hotham v. Berry.....	412
Howard, Robertson v.....	588
Howell v. Garton.....	495
Howerton v. Gas Co.....	367
Hughes v. Delautre.....	548
Hulsman v. Deal.....	518
Hunt v. Allen County.....	824
Hutto v. Knowlton.....	445

## I.

Ice & Cold Storage Co., Sheppard v.....	509
Independent Telephone Co., Bowland v.....	84, 357
<i>In re</i> Washington .....	829
Insurance Co., Brown v.....	442
Insurance Co., Funk v.....	525
Insurance Co., Jerrils v.....	320
Insurance Co., Rowland v.....	220
Insurance Co., Smith v.....	697
Investment Co., Aherne v.....	435
Investment Co. v. Andrew .....	550
Investment Co. v. King .....	216
Investment Co., Smith v.....	539
Iola, Bowlus v.....	774

## J.

James v. Logan.....	285
Jerrils v. Insurance Co.....	320
Johnson, Colean v.....	655
Johnson County, Hill v.....	813
Johnson, The State v.....	450

## K.

K. C. Rld. Co., Karner v.....	842
K. C. W. Rly. Co., Fliege v.....	147
K. C. W. Rly. Co., Ray v.....	704
Kamera v. Boiler Works.....	432
Kansas City Pipe Line Co., Day v.....	861
Kansas Gas Co., Howerton v.....	367
Kapp, Reese v.....	304
Karner v. Railroad Co.....	842
Kelly, Mitchell v.....	1
Kelley v. Schreiber.....	403
Kennedy, Gregory v.....	565
Kennedy, The State v.....	373

## TABLE OF CASES.

xi

King, Putnam v.....	216
King v. Bellamy.....	301
King v. Modern Woodmen.....	352
King v. Nilson.....	354
Kirby, Sellards v.....	291
Knowlton, Hutto v.....	445
Kramer, Mill Co. v.....	679
Kremer v. Schutz.....	175
Kruse v. Conklin.....	358

## L.

Lake v. Hargis.....	711
Land Co., Aherne v.....	435
Land Co., Smith v.....	539
Land Co. v. Andrew.....	550
Lane, Baker v.....	715
Lawrence, Van Buskirk v.....	76
Learned, Hopper v.....	859
LeCompte v. Smith.....	543
Lemaster v. Fisher.....	280
Leslie v. Railway Co.....	152
Less v. Yeats.....	105
Lewin, Caspar v.....	604
Lewis v. Barton.....	163
Lewis v. Railway Co.....	351
Light Co., Cauble v.....	541
Light Co., Prunty v.....	541
Linker v. Railroad Co.....	580
Loan Association v. Hobson.....	857
Loftus, Garrett v.....	556
Loftus, Read v.....	485
Logan, James v.....	285
Lumber Co. v. Loftus.....	556
Lyon County, Wolfe v.....	516
Lysle Milling Co. v. Schreiber.....	403

## M.

Maddux, Doty v.....	416
Maib v. Mill Co.....	660
Manley v. Railway Co.....	211
Manufacturing Co., Johnson v.....	655
Marks v. Chumos.....	562
Martin v. Garlock.....	266
Matheney v. El Dorado.....	720
Matthewson v. Hevel.....	134
Maupin, Starr v.....	859
Maynard v. Walthall.....	856
McAfee v. Walker.....	182, 355
McAuliff, McGee v.....	210
McClelland v. Railway Co.....	167
McCormick v. McCormick.....	31
McCullough v. Hayde.....	734
McDonald, Bowland v.....	84, 357
McDougle v. Greenlees.....	440
McGee v. McAuliff.....	210
McNutt v. Nellans.....	424
McVey, Bressler v.....	341

Mendenhall v. Wyandotte County.....	218
Mercantile Co., Patton v.....	81
Mercantile Co. v. Stiefel.....	7
Merchandise Co. v. Railway Co.....	308
Mikesell v. Wilson County.....	502
Milburn v. Beaty.....	207
Mill Co., Maib v.....	660
Mill Co. v. Kramer.....	679
Milling Co. v. Railway Co.....	256
Milling Co. v. Schreiber.....	403
Minard, Garrett v.....	338
Missouri Boiler Works, Kamera v.....	432
Mitchell v. Kelly.....	1
M. K. & T. Rly. Co., Lewis v.....	351
M. K. & T. Rly. Co., Manley v.....	211
M. K. & T. Rly. Co., Watkins v.....	308
M. K. & T. Rly. Co., Watt v.....	458
M. K. & T. Rly. Co., Young v.....	332
Modern Woodmen, Farington v.....	841
Modern Woodmen, King v.....	352
Moore, Duphorne v.....	159
Mo. Pac. Rly. Co., McClelland v.....	167
Mo. Pac. Rly. Co., Sayers v.....	123
Mo. Pac. Rly. Co., Smith v.....	248
Mo. Pac. Rly. Co., Tucker v.....	222
Mo. Pac. Rly. Co., Walters v.....	739
Morrison v. Pence.....	420
Mortgage Co., Schick v.....	90
Mosier v. Butler County.....	708
Mosiman v. Benefit Association.....	670
Mutual Benefit Association, Mosiman v.....	670
Mutual Fire Ins. Co., Smith v.....	697
Myers v. Shertzler.....	275

## N.

National Bank v. Abmeyer.....	283
National Bank v. Northup.....	638
National Bank v. Varner.....	691
Nation, Davis v.....	410
Nation, Goodland v.....	200
Nation, Railroad Co. v.....	345
Nation, Roll v.....	675
Nation, Schmidt v.....	821
Natural Gas Co., Howerton v.....	367
Neef v. Harrell.....	554
Nellans, McNutt v.....	424
Nelson v. Butler County.....	364
Newton v. Toevs.....	15
Nilson, King v.....	354
Northup, Bank v.....	638
Northup National Bank v. Varner.....	691
Noyes, Walrond v.....	118

# TABLE OF CASES.

xiii

## O.

Occidental Benefit Association, Mosiman v.....	670
Oil Co., Elliott v.....	78
Olathe, Edson v.....	4
O'Neil v. Epting.....	245
Osage City Cemetery Association v. Hanslip.....	20

## P.

Patton v. Hamilton .....	81
Pence, Morrison v.....	420
Philippi, Hospital Co. v.....	64
Pilgrim v. Verdigris.....	114
Pipe Line Co., Day v.....	861
Prunty v. Light Co.....	541
Puckett v. Hetzer.....	726
Putnam v. King.....	216

## R.

Radford, The State v.....	853,	863
Railroad Co., Fuqua v. ....		315
Railroad Co., Karner v. ....		842
Railroad Co., Linker v. ....		580
Railroad Co. v. Nation .....		345
Railroad Co. v. Scott County .....		795
Railway Co., Alstrum v. ....		858
Railway Co., Bowers v. ....		95
Railway Co., Cloud v. ....		851
Railway Co., Coon v. ....		311
Railway Co., Duncan v. ....		230
Railway Co., Fleeman v. ....		574
Railway Co., Fliege v. ....		147
Railway Co., Leslie v. ....		152
Railway Co., Lewis v. ....		351
Railway Co., Manley v. ....		211
Railway Co., McClelland v. ....		167
Railway Co., Milling Co. v.....		256
Railway Co., Ray v. ....		704
Railway Co., Roland v. ....		546
Railway Co., Sayers v. ....		123
Railway Co., Smith v. ....	136,	248
Railway Co., Tucker v. ....		222
Railway Co. v. Spaeth .....		861
Railway Co., Walters v. ....		739
Railway Co., Watkins v. ....		308
Railway Co., Watt v. ....		458
Railway Co., Young v. ....		332
Rawlins County v. Smith.....		857
Ray v. Railway Co.....		704
Read v. Loftus.....		485
Reese v. Kapp.....		304
Remington v. Walthall.....		234
Republic County Fire Ins. Co., Smith v.....		697
Rhea, Cooper v.....		109
Richardson, Fee v. ....		190
Riverside v. Bailey.....		429

Robertson v. Howard.....	588
Roland v. Railway Co.....	546
Roll v. Nation.....	675
Ronnau, Wilber v.....	171
Rosedale, Barbour v.....	213
Rowland v. Insurance Co.....	220
Royal Salt Co. v. Ellsworth County.....	203

## S.

Sage, Hampe v.....	728
Salina Mercantile Co. v. Stiefel.....	7
Salt Co., Lewis v.....	163
Salt Co. v. Ellsworth County.....	203
Sayers v. Railway Co.....	123
Sayler, Brice v.....	500
Schick v. Warren.....	90
School District v. Wilson County.....	806
Schmidt v. Nation.....	821
Schreiber, Kelley v.....	403
Schutz, Kremer v.....	175
Scott County, Railroad Co. v.....	795
Scott, The State v.....	856
Scott v. Arneal.....	208
Sellards v. Kirby.....	291
Shale v. Bank.....	649
Shawnee Fire Insurance Co., Funk v.....	525
Sheppard v. Storage Co.....	509
Shertzer, Myers v.....	275
Smith, LeCompte v.....	543
Smith, Rawlins County v.....	857
Smith v. Insurance Co.....	697
Smith v. Land Co.....	539
Smith v. Railway Co.....	136, 248
Spaeth, Railway Co. v.....	861
State Bank of Commerce, Dody v.....	406
State Bank v. Hart.....	398
State v. Brecount.....	195
State v. Chance.....	388, 392
State v. Dolley.....	533
State v. Eyman.....	777
State v. Johnson.....	450
State v. Kennedy.....	373
Starr v. Maupin.....	859
State v. Radford.....	853, 863
State v. Scott.....	856
State v. Topeka Club.....	756
State v. Turner.....	787
Stiles v. Valley Township.....	849
State v. White.....	777
State v. Wilson.....	858
State v. Voght.....	862
Stevens v. Anthony.....	179
Stiefel, Mercantile Co. v.....	7
Stewart v. Falkenberg.....	576
St. J. & G. I. Rly. Co., Roland v.....	546
St. L. & S. F. Rld. Co., Fuqua v.....	315
Storage Co., Sheppard v.....	509
Sugar and Land Co., Smith v.....	539
Surety Co., Bank v.....	691

# TABLE OF CASES.

xv

## T.

Telegraph Co., Hollingsworth v.....	472
Telephone Co., Bowland v.....	84, 357
Tile Co., Pilgrim v.....	114
Tile Co. v. Gas Co.....	752
Toeys, Newton v.....	15
Topeka Club, The State v.....	756
Township, Stiles v.....	849
Township v. Bailey.....	429
Trower, Beekman v.....	327
Tucker v. Railway Co.....	222
Turner, The State v.....	787

## U.

Udall Milling Co. v. Railway Co.....	256
United States Land Co., Smith v.....	539
U. P. Rld. Co., Linker v.....	580

## V.

Valley Township, Stiles v.....	849
Van Buskirk v. Lawrence.....	76
Van Hall v. Goertz.....	142
Varner, Bank v.....	691
Verdigris, Pilgrim v.....	114
Voght, The State v.....	862

## W.

Wagner v. Beadle.....	468
WaKeeney Investment Co. v. Andrew.....	550
WaKeeney Land Co., Aherne v.....	435
Walker, McAfee v.....	182, 355
Wall v. Culp.....	860
Walters v. Railway Co.....	739
Walthall, Maynard v.....	856
Walthall, Remington v.....	234
Walrond v. Noyes.....	118
Warren, Schick v.....	90
Washington, <i>In re</i> .....	829
Watkins v. Railway Co.....	308
Watt v. Railway Co.....	458
Western Union Telegraph Co., Hollingsworth v.....	472
Wheeland v. Gas Co.....	862
White, The State v.....	777
Wichita Cold Storage Co., Sheppard v.....	509
Wilber v. Ronnau.....	171
Wilkerson, Brown v.....	553
Wilson, Brumbaugh v.....	53
Wilson County, Mikesell v.....	502
Wilson County, School District v.....	806
Wilson, Holt v.....	268
Wilson, The State v.....	858
Windhorst, Hawkins v.....	522
Wolfe v. Lyon County.....	516
Woodmen, King v.....	352



---

Woodmen, Farington v.....	841
Wood v. Cross.....	215
Wyandotte County, Gunning v.....	218
Wyandotte County, Mendenhall v.....	218

## Y.

Yeats, Less v.....	105
Young, Heneks v.....	860
Young v. Railway Co.....	332
Yurann v. Hamilton.....	528

## CASES OVERRULED.

- Ashmore v. McDonnell, 16 Pac. 687 (not reported).  
See Gray v. Stewart, 70 Kan. 429.
- A. T. & S. F. Rld. Co. v. Johns, 36 Kan. 769 (in part).  
See Railroad Co. v. Chaney, 77 Kan. 276.
- A. T. & S. F. Rld. Co. v. Hague, 54 Kan. 284.  
See Railway Co. v. Durand, 65 Kan. 384.
- Bank v. Hardman, 62 Kan. 242.  
See Securities Co. v. Manwarren, 64 Kan. 636.
- Bedell v. National Bank, 16 Kan. 130.  
See Stettauer v. Carney & Stevens, 20 Kan. 497.
- Beverly v. Barnitz, 55 Kan. 451.  
See Beverly v. Barnitz, 55 Kan. 466.
- Brewster v. Madden, 15 Kan. 249.  
See Stark v. Morgan, 73 Kan. 453.
- Briggs v. C. K. & W. Rld. Co., 56 Kan. 526.  
See Railroad Co. v. Nyce, 61 Kan. 394.
- Brinkmeier v. Railway Co., 77 Kan. 14 (in part).  
See Brinkmeier v. Railway Co., 81 Kan. 101.
- Campbell v. The State, 3 Kan. 488.  
See Shellabarger v. Nafus, 15 Kan. 554.
- Ellinger v. Thomas, 64 Kan. 180.  
See Weaver v. Bank, 76 Kan. 540.
- Gannon v. Stevens, 13 Kan. 447.  
See Shellabarger v. Nafus, 15 Kan. 554.
- Hale v. Rawallie, 8 Kan. 136.  
See Shellabarger v. Nafus, 15 Kan. 554.
- Henschell v. Railway Co., 78 Kan. 411 (in part).  
See Caspar v. Lewin, 82 Kan. 604, 605.
- Hopkins, *Warden*, v. K. P. Rly. Co., 18 Kan. 462.  
See Cent. Branch Rld. Co. v. Lea, 20 Kan. 365.
- Howard Invest. Co. v. Benton Land Co., 5 Kan. App. 716.  
See Cones v. Gibson, 77 Kan. 425.
- Lawrence v. Leidigh, 58 Kan. 594.  
See Cory v. Spencer, 67 Kan. 648.
- Leavenson *et al.* v. Lafontaine, 3 Kan. 523.  
See Turner v. Crawford, 14 Kan. 504.
- Lewis v. Barton, 82 Kan. 163 (in part).  
See Caspar v. Lewin, 82 Kan. 604, 605.

- Madison v. Clippinger**, 74 Kan. 700 (in part).  
See **Caspar v. Lewin**, 82 Kan. 604, 605.
- Markin v. Priddy**, 39 Kan. 462.  
See **Markin v. Priddy**, 40 Kan. 689.
- Mellison v. Allen**, 30 Kan. 382 (in part).  
See **Stark v. Morgan**, 73 Kan. 453.
- O'Meara v. McDaniel**, 49 Kan. 685 (in part).  
See **Bolinger v. Brake**, 57 Kan. 668.
- Rahm v. Bridge Manufactory**, 16 Kan. 277.  
See **Rahm v. Bridge Manufactory**, 16 Kan. 531.
- Railway Co. v. Kirkham**, 63 Kan. 255.  
See **Railroad Co. v. Lieurance**, 80 Kan. 424, citing  
**Railway Co. v. Frogley**, 75 Kan. 440.
- Railway Co. v. Merrill**, 61 Kan. 671 (in part).  
See **Railway Co. v. Merrill**, 65 Kan. 436.
- Russell v. The State**, 11 Kan. 322.  
See **Shellabarger v. Nafus**, 15 Kan. 554.
- Sherman v. Luckhardt**, 65 Kan. 610.  
See **Sherman v. Luckhardt**, 67 Kan. 682.
- Sims v. Daniels**, 57 Kan. 552.  
See **Miller v. Clark**, 62 Kan. 279.
- Simmons v. Garrett, McCahon**, 82, 1 Kan. [Dass. ed.] 511.  
See **Burchfield v. Haffey**, 34 Kan. 43.
- State v. Hickox**, 64 Kan. 650.  
See **Crigler v. Shepler**, 79 Kan. 834.
- State v. Horne**, 9 Kan. 131.  
See **Shellabarger v. Nafus**, 15 Kan. 554.
- State v. Reisner**, 20 Kan. 548.  
See **State v. McGillvray**, 21 Kan. 680.
- Stewart v. Price**, 64 Kan. 191.  
See **Manley v. Park**, 68 Kan. 400.
- Stigers v. Stigers**, 5 Kan. 652.  
See **Finley v. Funk**, 35 Kan. 673.
- Warner v. Broquet**, 54 Kan. 649.  
See **Nagle v. Tieperman**, 74 Kan. 32.
- Watkins v. Glenn**, 55 Kan. 417.  
See **Beverly v. Barnitz**, 55 Kan. 466.
- W. & W. Rld. Co. v. Kuhn**, 38 Kan. 104.  
See **W. & W. Rld. Co. v. Kuhn**, 38 Kan. 675.

**CASES APPEALED TO THE SUPREME COURT  
OF THE UNITED STATES.****AFFIRMED.**

- Allen v. Riley**, 71 Kan. 378.  
See **Allen v. Riley**, 203 U. S. 347.
- Bank v. Fritzlen**, 75 Kan. 479.  
See **Fritzlen v. Boatmen's Bank**, 212 U. S. 364.
- Brandon v. Ard**, 74 Kan. 424.  
See **Brandon v. Ard**, 211 U. S. 11.
- Bridge Company v. K. P. Rly. Co.**, 12 Kan. 409.  
See **River Bridge Co. v. Kansas Pac. Ry. Co.**, 92 U. S. 315.
- Burnham v. Starkey**, 41 Kan. 604.  
See **Maddox v. Burnham**, 156 U. S. 544.
- Caldwell v. Miller**, 44 Kan. 12.  
See **Hutchinson Investment Co. v. Caldwell**, 152 U. S. 65.
- City of Kansas City v. Railway Co.**, 59 Kan. 427.  
See **Clark v. Kansas City**, 176 U. S. 114.
- C. K. & W. Rld. Co. v. Pontius**, 52 Kan. 264.  
See **Chicago &c. Railroad Co. v. Pontius**, 157 U. S. 209.
- Clark v. Herington**, 62 Kan. 866.  
See **Clark v. Herington**, 186 U. S. 206.
- Comm'rs of Franklin Co. v. Pennock**, 18 Kan. 579.  
See **Pennock v. Commissioners**, 103 U. S. 44.
- C. R. I. & P. Rly. Co. v. McGlinn**, 28 Kan. 274.  
See **Chicago & Pacific Rly. Co. v. McGlinn**, 114 U. S. 542.
- Ft. L. Rld. Co. v. Lowe, Sheriff**, 27 Kan. 749.  
See **Fort Leavenworth Rld. Co. v. Lowe**, 114 U. S. 525.
- Henley v. Meyers**, 76 Kan. 723.  
See **Henley v. Meyers**, 215 U. S. 373.
- In re Lowe, Appellant**, 47 Kan. 769.  
See **Lowe v. Kansas**, 163 U. S. 81.
- K. P. Rly. Co. v. Dunmeyer**, 24 Kan. 725.  
See **Kansas Pacific Ry. Co. v. Dunmeyer**, 113 U. S. 629.
- K. P. Rly. Co. v. M. K. & T. Rly. Co.**, 15 Kan. 15.  
See **Mo., etc., Ry. Co. v. Kan. Pac. Ry. Co.**, 97 U. S. 491.
- Larabee v. Railway Co.**, 74 Kan. 808.  
See **Missouri Pacific Ry. v. Larabee Mills**, 211 U. S. 612.
- Libbey v. Clark**, 25 Kan. 496.  
See **Libbey v. Clark**, 118 U. S. 250.

- Manley v. Park**, 62 Kan. 553.  
See **Manley v. Park**, 187 U. S. 547.
- Meffert v. Medical Board**, 66 Kan. 710.  
See **W. M. Meffert v. E. B. Packer et al.**, 195 U. S. 625.
- Mitchell v. Comm'rs of Leavenworth**, 9 Kan. 344.  
See **Mitchell v. Commissioners, etc.**, 91 U. S. 206.
- M. K. & T. Rly. Co. v. Cook**, 47 Kan. 216.  
See **M., K. & T. Railway Co. v. Cook**, 163 U. S. 491.
- M. K. & T. Rly. Co. v. Haber**, 56 Kan. 694.  
See **M. K. & T. Railway v. Haber**, 169 U. S. 613.
- Mo. Pac. Rly. Co. v. Mackey**, 33 Kan. 298.  
See **Missouri Railway Co. v. Mackey**, 127 U. S. 205.
- National Bank v. Ayres**, 53 Kan. 463.  
See **First National Bank v. Ayers**, 160 U. S. 660.
- National Bank v. Robinson**, 59 Kan. 777.  
See **Farmers' National Bank v. Robinson**, 176 U. S. 681.
- Railroad Co. v. Harris**, 76 Kan. 255.  
See **Union Pac. Rld. Co. v. Harris**, 215 U. S. 386.
- Railroad Co. v. Matthews**, 58 Kan. 447.  
See **Atchison, Topeka, &c., Rld. v. Matthews**, 174 U. S. 96.
- Railroad Co. v. Morasch**, 60 Kan. 251.  
See **Erb v. Morasch**, 177 U. S. 584.
- Railway Co. v. Martin**, 59 Kan. 437.  
See **C., R. I. &c., Ry. Co. v. Martin**, 178 U. S. 245.
- Railway Co. v. Herman**, 64 Kan. 546.  
See **K. C. Suburban Belt Ry. Co. v. Herman**, 187 U. S. 68.
- Schrimpcher v. Stockton**, 58 Kan. 758.  
See **Schrimpscher v. Stockton**, 183 U. S. 290.
- State v. Asbell**, 74 Kan. 397.  
See **Asbell v. Kansas**, 209 U. S. 251.
- State v. Atkin**, 64 Kan. 174.  
See **Atkin v. Kansas**, 191 U. S. 207.
- State v. Durein**, 70 Kan. 1.  
See **Fritz Durein v. Kansas**, 208 U. S. 613.
- State v. Jack**, 69 Kan. 387.  
See **Jack v. Kansas**, 199 U. S. 372.
- State v. Mugler**, 29 Kan. 252.  
See **Mugler v. Kansas**, 123 U. S. 623.
- State v. Railway Co.**, 76 Kan. 467.  
See **Mo. Pac. Ry. Co. v. Kansas**, 216 U. S. 262.
- State v. Smiley**, 65 Kan. 240.  
See **Smiley v. Kansas**, 196 U. S. 447.
- Stevens v. Smith**, 2 Kan. 243.  
See **Smith v. Stevens**, 10 Wall. 321.

Wiggin v. King, 35 Kan. 410.  
See Wiggan v. Conolly, 163 U. S. 56.

## DISMISSED.

Bigger v. Ryker, 62 Kan. 482.  
See Bigger v. Ryker, 184 U. S. 696.

Clay Center v. Light Co., 78 Kan. 390.  
See Clay Center Light Co. v. Clay Center, 212 U. S. 564.

Davis v. Coventry, 65 Kan. 557.  
See Coventry *et al.* v. Davis *et al.*, 193 U. S. 668.

Dobbs v. The State, 63 Kan. 321.  
See Dobbs and New v. Kansas, 184 U. S. 696.

End. & Ben. Asso. v. The State, 35 Kan. 253.  
See Kansas End. Asso. v. Kansas, 120 U. S. 103.

Hughes v. Kepley *et al.*, 60 Kan. 859.  
See Hughes v. Kepley *et al.*, 191 U. S. 557.

Insurance Co. v. National Bank, 58 Kan. 86.  
See German Ins. Co. v. First Nat. Bank, 173 U. S. 702.

Larson v. Cox, 39 Kan. 631.  
See Larson v. Cox, 145 U. S. 644.

Olson v. Cox, 39 Kan. 634.  
See Olson v. Cox, 145 U. S. 650.

Sanger v. Rice, 43 Kan. 580.  
See Rice v. Sanger, 144 U. S. 197.

Sewell v. Railway Co., 78 Kan. 1, 16.  
See A. T. & S. F. Rly. Co. v. Sewell, 215 U. S. 612.

Simpson v. Greeley, 8 Kan. 586.  
See Simpson v. Greeley, 20 Wall. 152.

State v. Baldwin, 36 Kan. 1.  
See Baldwin v. Kansas, 129 U. S. 52.

State v. Book Co., 65 Kan. 847.  
See American Book Co. v. Kansas, 193 U. S. 49.

State v. Plamondon, 75 Kan. 269.  
See Plamondon v. Kansas, 215 U. S. 615.

State v. Rose, 74 Kan. 262.  
See Rose v. Kansas, 203 U. S. 580.

State v. Scott Co., 58 Kan. 491.  
See Scott County v. Kansas, 174 U. S. 799.

State v. Thomas, 74 Kan. 360.  
See Chod Thomas v. Kansas, 205 U. S. 535.

Topeka v. Kersch, 70 Kan. 840.  
See Kersch v. Topeka, 207 U. S. 600.

## MODIFIED.

Fackler v. Ford *et al.*, McCahon, 21, 1 Kan. [Dass. ed.] 463.  
See Fackler v. Ford *et al.*, 24 How. 322.

## REVERSED.

- Ard v. Brandon, 43 Kan. 425.  
See Ard v. Brandon, 156 U. S. 537.
- Ard v. Pratt, 43 Kan. 419.  
See Ard v. Pratt, 156 U. S. 537.
- Beverly v. Barnitz, 55 Kan. 466.  
See Barnitz v. Beverly, 163 U. S. 118.
- Blue-Jacket v. Johnson County *et al.*, 3 Kan. 299.  
See The Kansas Indians, 5 Wall. 737.
- Dunbar v. Green, 66 Kan. 557.  
See Dunbar v. Green, 198 U. S. 166.
- K. P. Rly. Co. v. Culp, 9 Kan. 38.  
See Railway Company v. Prescott, 16 Wall. 603.
- Miami County v. Wan-zop-pe-che *et al.*, 3 Kan. 364.  
See The Kansas Indians, 5 Wall. 759.
- Mo. Pac. Rly. Co. v. Sharitt, 43 Kan. 375.  
See C. R. I. &c. Railway v. Sturm, 174 U. S. 710, 713.
- Tullock v. Mulvane, 61 Kan. 615.  
See Tullock v. Mulvane, 184 U. S. 497.
- U. P. Rly. Co. v. Harwood, 31 Kan. 388.  
See Pacific Railroad Removal Cases, 115 U. S. 1.
- Railway Co. v. Campbell, 58 Kan. 818.  
See C. R. I. &c. Railway v. Campbell, 174 U. S. 718.
- Railway Co. v. Sturm, 58 Kan. 818.  
See C. R. I. &c. Railway v. Sturm, 174 U. S. 710.
- Rankin v. Barton, 69 Kan. 629.  
See Rankin v. Barton, 199 U. S. 228.
- State v. Pullman, 75 Kan. 664.  
See Pullman Co. v. Kansas, 216 U. S. 56.
- State v. Saunders, 19 Kan. 127.  
See Geer v. Connecticut, 161 U. S. 519, 534, 540.
- State v. Telegraph Co., 75 Kan. 609.  
See West. Un. Tel. Co. v. Kansas, 216 U. S. 1.
- Text-book Co. v. Pigg, 76 Kan. 328.  
See International Text Book Co. v. Pigg, 217 U. S. 91.

## NOTE.

This volume contains the opinions delivered in March, April, May and June, 1910. It contains 146 opinions delivered by the Justices, as follow: JOHNSTON, C. J., 22; BURCH, J., 19; MASON, J., 23; SMITH, J., 17; PORTER, J., 22; GRAVES, J., 19; BENSON, J., 24. Mr. Chief Justice JOHNSTON dissented in one case (p. 679). Mr. Justice BURCH rendered a dissenting opinion in one case (p. 158), and dissented in another case (p. 543). Mr. Justice MASON rendered an opinion specially concurring in one case (p. 636). Mr. Justice SMITH rendered a dissenting opinion in one case (p. 845). Mr. Justice PORTER rendered opinions specially concurring in two cases (pp. 370, 637), dissenting opinions in three cases (pp. 141, 475, 483), and dissented in another case (p. 159). Mr. Justice GRAVES dissented in two cases (pp. 159, 372). Mr. Justice BENSON rendered dissenting opinions in two cases (pp. 371, 678). Opinions *per curiam* were delivered in 41 cases, all of which are reported.





# SUPREME COURT, STATE OF KANSAS.

JANUARY TERM, 1910.

**PRESENT:**

HON. WILLIAM A. JOHNSTON, CHIEF JUSTICE.	
HON. ROUSSEAU A. BURCH,	
HON. HENRY F. MASON,	
HON. CLARK A. SMITH,	
HON. SILAS W. PORTER,	
HON. CHARLES B. GRAVES,	
HON. ALFRED W. BENSON,	

} JUSTICES.

**HILLIS S. MITCHELL, as Guardian, etc., Appellant, v.  
S. J. KELLY, as Administrator, etc., et al., Appellees.**

No. 15,702.

**SYLLABUS BY THE COURT.**

**PRACTICE, DISTRICT COURT—***Action against Sureties and Administrator of Guardian—Conversion—Settlement in Probate Court.* An action may be maintained in the district court against the administrator of a guardian who converted his ward's money, became insolvent and died, and against the sureties on the guardian's bond, without a previous settlement of the guardian's accounts in the probate court.

Appeal from Johnson district court; WINFIELD H. SHELTON, judge. Opinion filed March 12, 1910. Re-

*J. H. Hindman, and John T. Little, for the appellant. versed.*

*I. O. Pickering, and H. L. Burgess, for the appellees.*

1—82 KAN.

---

Mitchell v. Kelly.

---

The opinion of the court was delivered by

BURCH, J.: The question in this case relates to the liability of a surety on the bond of a guardian for minor children. The petition charged that a deceased guardian converted money belonging to his wards to his own use, became insolvent, and died without an accounting. The surety on the bond demurred on the ground that a settlement of the guardian's accounts in the probate court is a condition precedent to recovery against him. The demurrer was sustained, and the present guardian, who brought the action, appeals.

The statute relating to guardians and wards (Gen. Stat. 1901, §§ 3274-3305) requires that the property of a minor shall be managed by a guardian, who upon due appointment and qualification shall take charge of it for that purpose. Section 3280 reads as follows:

"Guardians appointed to take charge of the property of the minor must give bond, with surety to be approved by the court, in a penalty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardian according to law. They must also take an oath of the same tenor as the condition of the bond."

The bond given in this case was conditioned as follows:

"The condition of the above bond is that if Henry A. Taylor, guardian of the estate of Leanna, Richard M. and Edward S. Taylor, minors, shall faithfully discharge his duties as guardian, according to law, account for, pay and deliver all money and property of said estate, and perform all other things touching said guardianship required by law, or the order or decree of any court having jurisdiction, then the above bond to be void, otherwise to remain in full force."

The very situation which this bond was given to meet is presented. The guardian used up the money of his infant wards, is dead, and left no estate from which they may be reimbursed. His sureties must pay, and

the enforcement of their liability ought not to be fettered by rules based upon any considerations except those of substance.

The district court possesses both law and equity powers, which may be exercised in the same proceeding. It has general jurisdiction to investigate accounts and to ascertain and declare balances due, and it possesses the common-law powers always exercised by chancery courts to settle guardians' accounts. Its methods and rules of procedure are as well calculated to attain just results as are those of the probate court. A finding of a balance due from the defunct guardian and of facts making the equivalent of a default must precede a judgment holding the surety liable. It is no detriment to the surety that he is a party to the preliminary inquiry and may actively participate in it. There is no statute forbidding the district court to act, and why should it refuse to do so? The only reason offered is that by analogy the procedure usually followed in cases of defaulting executors and administrators should be adopted. The analogy is destroyed by this fact: Administration is a definite proceeding to a definite end—the collection of assets, the payment of debts, and the distribution of the residue. To accomplish this purpose the probate court has full possession of the entire subject matter. All results are to be worked out there, and to invoke the jurisdiction of the district court with reference to the estate's accounts is to interfere with the due and orderly conduct of a pending proceeding. In no sense is this true in cases of guardianship terminated by the death of the guardian. The guardian is a managing agent for his ward, nobody is interested in his conduct except the ward, and his duty is primarily to account to the ward rather than to the court. This fact is made clear by the omission from the statute of any provision for a final settlement as of the estate of a deceased person. The ward, on reaching his majority, may settle with the guardian as he pleases.

---

Edson v. Olathe.

---

When the guardian dies the trust does not pass to his executor or administrator. His personal representative stands toward the ward as any third person having money or property of the ward in his possession. There is nothing like a pending cause before the probate court to be broken into, and no substantial reason is apparent why the new guardian may not bring his action in the district court. The authorities are divided upon this question (21 Cyc. 240), and the court adopts the view which seems to accord best with the statutes and legal policy of this state.

In all other respects the action was well brought. The record shows that the original petition was refiled and then amended by interlineation so that the certificate to the transcript is not impeached. The fact that one of the minors became of age after judgment does not abate the proceeding here. The motion to dismiss is denied and the judgment of the district court is reversed, with direction to overrule the demurrer to the petition.

---

J. A. EDSON, as *Receiver, etc.*, Appellant, v. THE CITY OF OLATHE, Appellee.

No. 16,202.

SYLLABUS BY THE COURT.

**DAMAGES—Liability of a City—Misfeasances of Officers Acting in a Governmental Capacity.** The state does not guarantee the judgment or fidelity of its officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of *respondet superior* does not apply in such cases.

Appeal from Johnson district court; WINFIELD H. SHELDON, judge. Opinion denying a rehearing, filed

March 12, 1910. (For original opinion see *Edson v. Olathe*, 81 Kan. 328.)

A. F. Hunt, jr., F. R. Ogg, S. D. Scott, and S. T. Seaton, for the appellant.

C. L. Randall, city attorney, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The original opinion (81 Kan. 328) shows that the cause of action presented by the petition was based on the passage of the repealing ordinance. This position, it was said, was finally abandoned in this court, and error was predicated upon a theory not embraced in the petition. In a petition for a rehearing it is said the plaintiff did not abandon the claim that the passage of the repealing ordinance gave a cause of action. The court accepted and acted upon the declaration of counsel for the plaintiff made in an addendum to the reply brief which reads as follows:

"The plaintiff in this case does not rely on the *passage* of the ordinance as a cause of action, but on the *ministerial act of publication*, and the *subsequent* repudiation of the contract by the city and its *arbitrary* refusal to proceed with the contracts [and] approve its bonds and plans, without which the plaintiff could not lawfully enter upon the streets."

The italics are those of the brief-maker.

Ordinarily the court must decline to give its opinion upon questions which have been withdrawn from its consideration. Since, however, in this instance the only cause of action stated in the petition was for the passage of the repealing ordinance, and the petition for a rehearing indicates a desire for a ruling upon the sufficiency of the petition in its true aspect, the court will state its views.

In passing the repealing ordinance the mayor and council were for the time the legal equivalent of the legislature of the state of Kansas. The repealing ordinance was a public law promulgated by the sovereign

authority of the state. No private proprietary corporate function or interest of the city was involved. The purely local good of the community was a desideration only as it was a part of the general public welfare. The constitution of the United States is a paramount law of the land. The state legislature and its agent and representative in this matter, the city legislature, were bound to observe that law. From the face of the petition it appears the city did not do this and that, consequently the repealing ordinance was void. If proper application had been made to any court of the state having jurisdiction the ordinance would have been adjudged to be a nullity, and all the officers and agents of the city would have been restrained and enjoined from enforcing the ordinance and from disturbing the plaintiff in the enjoyment of its franchise rights. Besides this, any person acting under the warrant of the void ordinance who trespassed upon the plaintiff's rights would, in a proper action, be adjudged to pay the damages he occasioned. But the law of this state affords the plaintiff no other remedies. The state does not guarantee the judgment or fidelity of its governmental officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of *respondeat superior* does not apply in such cases. Therefore the petition fails to state a cause of action.

Other matters presented by the petition for a rehearing require no further notice, and the petition is denied.

THE SALINA MERCANTILE COMPANY, *Appellee*, v.  
SIGMUND STIEFEL *et al.*, *Appellants*.

No. 16,280.

SYLLABUS BY THE COURT.

1. CORPORATIONS—*Dividends out of Invested Capital Induced by Willful Deceit of Stockholders—Liability of Stockholders.* Where the directors of a corporation intend to distribute only its accrued profits, but a stockholder, by willfully deceiving them as to the surplus on hand, induces them to declare and pay a dividend the effect of which is to reduce the amount of the invested capital, he thereby fraudulently obtains from the company the sum by which his own share in the distribution has been increased by such misrepresentation; and is liable to it in at least that amount.
2. FRAUD—*Joint Wrongdoers—Authorization or Adoption of Another's Act.* Where several stockholders unite in the perpetration of such a fraud they are liable jointly to the extent of the total excess received by all.
3. CORPORATIONS—*Consent of Minority of Directors to Excessive Dividend Procured by Deceit of Majority.* Where the participants in such a fraud constitute a majority of the board of directors, and by deceiving in the manner indicated the other members induce their concurrence in the declaration of such an excessive dividend, the situation presented is the same as though the conspiring stockholders, not being themselves directors, had so misled the entire membership.

Appeal from Saline district court; ROLLIN R. REES, judge. Opinion filed March 12, 1910. Affirmed.

T. L. Bond, and R. A. Lovitt, for the appellants.

Z. C. Millikin, C. W. Burch, and B. I. Litowich, for the appellee.

The opinion of the court was delivered by

MASON, J.: Sigmund Stiefel and Pauline Rothschild appeal from a judgment rendered in an action brought against them by the Salina Mercantile Company, a Kansas corporation. The principal controversy is whether the petition stated a cause of action. Its sub-



stantial allegations, so far as necessary for the determination of this question in its general aspect (leaving some special features of the matter to be considered later), were as follow :

The corporation had an authorized capital of \$40,000, of which \$37,000 was paid up. The defendants were stockholders. For purposes of their own they wished a dividend to be declared in excess of the accrued profits of the business. To accomplish this result they represented to the directors that there was a surplus on hand of \$26,148.90—that is, that the assets of the company exceeded its paid up capital by that amount. In fact the surplus was only \$20,148.90, the merchandise being worth \$53,818.90, and other property bringing the total assets up to \$57,148.90. The defendants knew the actual value of the merchandise, but to gain their end falsely represented to the directors that an invoice which had just been taken showed it to be worth \$59,818.90—a “padding” of \$6000. The directors, believing the misrepresentation, and relying upon it, distributed among the stockholders \$26,148.90, supposing the company to have that amount in excess of the capital invested, when in fact it had but \$20,148.90. By virtue of the deception the defendants received \$4000 in excess of what their share would have been had only the real surplus been divided, and the plaintiff asked and obtained judgment for this amount.

The substance of the plaintiff’s claim is that the defendants by means of false representations induced it to pay out money which otherwise it would not have parted with. It also maintains that the directors had no power to distribute any amount beyond the actual surplus, because, “with the exception of dividends in liquidation, dividends can be declared and paid only where there are profits to divide.” (10 Cyc. 551.) The defendants insist that the rule quoted is solely for the protection of creditors, and that if a corporation owes no debts its directors may without doing it a wrong

divide any or all of its assets among the stockholders, since this would merely be restoring the property to its real owners. Obviously, however, each stockholder has an interest in the preservation of his investment in its integrity. He is entitled to all the advantages of his venture—not merely to a return of his money. And the text-writers agree that for this reason the payment of any part of a dividend out of the capital stock is an invasion of his rights. In volume 1 of the second edition of Morawetz on Private Corporations, section 276, it is said:

“Every shareholder in a corporation is entitled to have the capital preserved unimpaired, for the purpose of carrying on the business for which the company was formed. Dividends can be paid only out of profits; and any attempt to distribute *capital* in the shape of dividends will be enjoined by a court of chancery, upon application of a dissenting member.”

(See, also, 2 Cook, Corp., 6th ed., §§ 546, 547; Taylor, Priv. Corp., 5th ed., § 565; 2 Clark & Marshall, Priv. Corp. § 519; 4 Thompson, Corp., 2d ed., § 3660; 10 Cyc. 551.)

Nevertheless we find no instance of a court holding a dividend illegal because encroaching upon the capital stock, except where an express provision of the statute was violated or the security of creditors was drawn in question. But the plaintiff's case does not rest upon the question of capacity. Assuming that where all the persons concerned know the actual facts and agree to the action taken the directors of a corporation may lawfully declare a dividend somewhat in excess of the accrued profits, the assumption falls far short of justifying the conduct charged against the defendants. Granting that it may sometimes be lawful for directors to declare a dividend made up in part of the invested capital, the act is unnatural and unusual. According to the allegations of the petition the directors in this case had no thought of exercising that power if they possessed it. Plainly their purpose was not to impair the

capital, but to distribute the accumulated earnings. They consented to divide \$26,148.90 only because they understood that to be the surplus. If they had known the real facts they would have limited the amount to \$20,148.90. Thus by a willfully false statement they were induced to pay out \$6000 of the corporation's funds—to diminish the working capital by that amount, innocently and ignorantly. Such an impairment of its resources—unintentional on its part—might be a serious injury to it. Whether that result followed in fact is not important. The company was induced by false pretenses to pay out money that it would otherwise have retained for use in its business. That the money went to its own stockholders does not alter the case, for it has an entity of its own. True, a stockholder who by fraud procures the declaration of an excessive dividend might seem to have nothing to gain, because his stock would become less valuable just in proportion as the corporation was defrauded. But he might have special reasons for wishing to obtain at once a larger cash payment than he was entitled to, and at all events this consideration could not affect the right of the corporation to demand redress for the wrong perpetrated upon it. The paid-up capital of a corporation is contributed on the theory that the amount raised is necessary to its efficient operation. It does not follow that if a part of it is returned to the subscribers the general loss to all by the impaired efficiency of the company is fully compensated by the share each individually receives in the distribution. We conclude that the petition stated a cause of action, upon the ground that where the directors of a corporation intend to distribute only its accrued profits, and a stockholder by willfully deceiving them as to the surplus on hand induces them to declare and pay a dividend the effect of which is to reduce the amount of the invested capital, he thereby fraudulently obtains from the corporation the sum by which his own share in the distribution has been increased by such

misrepresentation, and is liable to it in at least that amount.

In Judge Seymour D. Thompson's article on "Corporations" in volume 10 of the *Cyclopedia of Law and Procedure*, at page 549, it is said:

"If a dividend has been illegally declared in the sense that its declaration is *ultra vires*, as where it is a dividend out of assets when there is no surplus to divide, then it seems that it may be rescinded by the corporation even after it has been paid, and that the corporation may recover it of the shareholders as so much money paid to their use under a mutual mistake. It has been well reasoned that shareholders among whom assets of the corporation have been distributed by its officers, without authority from the corporation, or when acting outside the scope of their ordinary powers, are technically at least guilty of a conversion of such assets."

If money paid to a stockholder under such circumstances may be recovered as a payment made under a mutual mistake, or upon the theory of a technical conversion, there are stronger grounds for the recovery of the proceeds of an excessive dividend made under an erroneous understanding of the real situation, induced by the willful deceit of some of the beneficiaries. It is true that the cases by which the text quoted is supported turn upon the duty of the corporation to protect the rights of creditors, but certainly the protection of its own members is just as important and just as capable of enforcement by an action brought in the corporate name.

A special feature of the case as set out in the petition requires now to be noticed. The corporation had but three directors. The defendant Stiefel was one. E. Rothschild, the husband of the other defendant, and her agent in all matters connected with the company, was the second. B. A. Litowich was the third. According to the plaintiff's allegations E. Rothschild, acting in behalf of his wife, was a party to the fraud. As he and Stiefel constituted the majority of the board it

is obvious that they could have controlled its action at their pleasure and in one sense can not be said to have misrepresented matters to its members. But they are alleged to have deceived the third member, Litowich, and thereby procured his coöperation in declaring the dividend. A deception practiced upon him under the circumstances was the same in legal effect as though practiced upon the board. The other two members could not have held a valid meeting without giving him an opportunity to be present. Perhaps he could not have prevented their action if they had seen fit to out-vote him, but he was entitled to be heard with a knowledge of the real facts. Had he known the truth he might have been able to dissuade them from their project. He might in various ways have at least attempted to prevent the consummation of the fraud. The deception practiced on him may therefore fairly be said to have caused the action of the board. Procuring his acquiescence in the plan proposed, by false representations as to the state of the business, was to all intents and purposes procuring the action of the board by that means.

Another phase of the case as stated in the petition serves to supply a possible motive for the fraud alleged. The 370 shares of the company were held as follows: Stiefel, 22; Pauline Rothschild, 188; E. Rothschild, 1; Litowich, 159. By an arrangement between all, however, it was agreed that the earnings in excess of 7 per cent per annum, instead of being distributed in proportion to the amount of stock held, should be divided equally between Stiefel, Pauline Rothschild and Litowich. The dividend in question included the earnings of three years, and therefore an amount equal to 21 per cent of the capital, or \$7770, was distributed proportionately to the ownership of the stock. The remainder, including the excess of \$6000, was divided according to the special agreement. Therefore the defendants received two-thirds of this \$6000 of the capital

---

Mercantile Co. v. Stiefel.

---

stock, only about 57 per cent of which they had contributed. The evidence suggested a further motive, as it tended to show that the defendants at the time of the transaction had made plans which were afterward carried out for the sale of their stock. There was also evidence that the capital of the corporation was soon increased, a matter which perhaps had some bearing as indicating that the situation did not call for a reduction of the amount invested.

The evidence showed that the action of the directors was approved by a unanimous vote at a stockholders' meeting, but this does not affect the rights of the parties, for any deception practiced upon Litowich as a director necessarily affected his conduct as a stockholder as well.

The defendants asked to have the petition made more definite as to the character of the fraud charged, and now complain of the denial of that motion. We think the allegations as already indicated were sufficiently specific. Complaint is made that there was an entire failure of proof, either that the invoice was incorrect, or, if so, that the defendants knew it. No particular item of the invoice was shown to be wrong, but there was testimony regarding the business done in previous years, and the general appearance of the stock of dry goods, from which the jury might reasonably have inferred that the value of the merchandise in that department must have been overstated by substantially the amount claimed in the petition. There was also testimony which if it was credible—and that was for the jury to determine—tended to show a substitution of a different book for one of those used in making the invoice. We can not say that there was an entire failure of the evidence to support the allegations of the petition. The principle is invoked that to sustain a charge of fraud positive proof must be offered. The application of that test, however, is for the trial court. Here the only inquiry open is whether the finding of the jury

is supported by any substantial evidence. (*Wooddell v. Allbrecht*, 80 Kan. 736.)

The defendants argue that they were not jointly liable, especially for the reason that Pauline Rothschild could not be held for a larger amount than she received, inasmuch as she was not responsible for any misconduct of her husband while he was acting as a director of the company. The essence of the offense charged, however, was not merely that Stiefel and E. Rothschild as directors declared an illegal dividend, but that for the sake of a benefit to accrue to the defendants as stockholders they fraudulently misrepresented the condition of the company so as to make such dividend appear to be natural and proper, and to procure the consent of Litowich thereto. In this phase of the matter, if the plaintiff's allegations are true, E. Rothschild acted as the agent of his wife, and she was answerable for the fraud which he committed while acting within the scope of his authority. (20 Cyc. 85.) The damages recovered being based upon a willful tort, in the perpetration of which the defendants coöperated, their liability was joint.

One of the defendants accepted certain notes in part payment of the dividend, and it was suggested that there should have been proof of their value. The declaration of the dividend was admitted, and the question whether its amount was excessive was not affected by the consent of a stockholder to accept as his share something else in lieu of money.

Various portions of the instructions are complained of, but the objections made raise substantially the questions of law already discussed. The judgment is affirmed.

Costs will be allowed for but two-thirds of the counter abstract, substantially one-third of it being made up of pleadings, instructions and findings which had already been printed in full in the abstract.

BURCH, J., not sitting.

THE CITY OF NEWTON, *Appellee*, v. H. F. TOEVS,  
*Appellant*.

No. 16,802.

## SYLLABUS BY THE COURT.

1. **EVIDENCE**—*Taken before a Referee—Procedure to Obtain a Review by the Trial Court.* A party desiring to have the evidence which has been taken in a trial before a referee reviewed by the district court, to determine whether it supports the findings, should have a bill of exceptions containing such evidence allowed by the referee; and, if it is necessary to do so, should apply to the referee for time to prepare exceptions.
2. ——— *Same.* If there is not sufficient time, or opportunity is not given to make such application to the referee, it should be made to the court, and for the purpose of having such exceptions allowed by the referee the court may direct the report to be held, or, if filed, to be referred back to the referee; or the court might order the referee to report the evidence.
3. ——— *Review by the Supreme Court—Testimony Not Reviewed by District Court.* Evidence taken before a referee but not brought before the district court can not properly be reviewed in this court to determine whether it supports the findings of the referee, but upon an examination of that part of it which is abstracted it is found to support the findings to which it relates.

Appeal from Harvey district court; PETER J. GALLE, judge. Opinion filed March 12, 1910. Affirmed.

## STATEMENT.

THE defendant was treasurer of the city of Newton from April, 1893, to May, 1905. He was sued for an amount alleged to be due to the city because of errors, omissions and incorrect charges in his accounts. A trial before a referee resulted in a judgment against him, from which he appeals.

The referee resided in Hutchinson. The defendant's attorney resided in Newton. On December 13 the de-

82	15
82	404



---

Newton v. Toevs.

---

defendant received a notice by mail from the referee that his report would be filed on the 16th day of that month at Newton, and a copy of the report was enclosed with the notice. On the next day he sent his objections and exceptions to the referee by mail, which the referee mailed to the clerk, the report having been sent to the clerk before the exceptions were received. The exceptions were principally upon the ground that the evidence did not sustain the findings. December 15 was Sunday. The report was filed on the 16th. On December 17 the defendant's attorney filed a motion in court to set aside the report, embodying the same objections stated in the exceptions sent to the referee, together with his affidavit showing that voluminous testimony had been taken on the trial by three stenographers, one being the official court stenographer, and that transcripts of the evidence could not be obtained in less than two weeks. On December 18 the court convened, and on the application of the defendant continued the hearing of the motion to set aside the report, as well as a motion of the plaintiff to confirm it, until January 9. On January 8 the defendant filed another motion to set aside the report, for the reason that no time had been given by the referee to prepare a bill of exceptions before filing it. This reason was not included in his first motion, nor in the exceptions mailed to the referee. On January 9 the defendant filed another application for a continuance of all the pending motions, "to give time to procure from the stenographer a complete transcript of the evidence, . . . with the exhibits offered, . . . and file the same with the clerk." He offered the testimony of his attorney in support of this application, showing the receipt of the notice from the referee, his action thereon, and his efforts, after receiving notice from the referee, to procure transcripts of the testimony, which transcripts had not yet been completed. On cross-examination it

was shown that he did not apply to the referee for time to prepare a bill of exceptions embodying the testimony, the witness stating that he did not have time to do so. The continuance was refused, the report confirmed, and judgment was entered thereon. A motion to set aside the findings and for a new trial was denied. The defendant asked for, and was granted, time until February 11 in which to prepare a bill of exceptions. The bill of exceptions was allowed and filed on that day, but it did not contain any of the evidence taken on the trial. The time for making a case for the supreme court was, upon the application of the defendant, extended to the 15th day of May, 1908. On that day the defendant filed a transcript of the notes of the three stenographers, each of whom had taken a part of the testimony before the referee. The official stenographer certified to the part so taken by him, as provided by section 1 of chapter 320 of the Laws of 1905. The other stenographers certified to the parts taken by them respectively. On the same day the defendant served notice on the plaintiff's attorney of the filing of such transcripts, and also presented to the judge, in pursuance to a notice previously given, a purported case-made, which was signed and filed on that day. The case-made contains a transcript of the record, including the evidence so certified to by the stenographers, and is certified to as provided by the rules of this court.

*Clarence Spooner*, for the appellant; *G. F. Grattan*, of counsel.

*Cyrus S. Bowman*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: A motion has been made to dismiss the petition in error because the case-made was not signed in time. The case was signed on the day to which the time allowed therefor had been last extended, which

---

Newton v. Toevs.

---

was too late. (*Maynes v. Gray*, 69 Kan. 49.) This seems to be conceded. A transcript of the record, however, is included in the case-made and the motion can not be sustained.

The defendant alleges error in sustaining the plaintiff's demurrer to one of the defenses contained in his answer, and in overruling his demurrer to one of the grounds of the reply. As these decisions were made more than one year before the record was filed in this court they can not be reviewed. (*Corum v. Hubbard*, 69 Kan. 608; *Gas Co. v. Altoona*, 79 Kan. 466.)

Motions to require the plaintiff separately to state its causes of action and otherwise correct its petition were denied, and this ruling is also complained of. The only cause of action was the failure of the defendant to account for and pay over to his successor the money in his hands as treasurer. Incidental to this charge some of the items of alleged shortage are specified, but these are not separate causes of action and the ruling was not erroneous.

The defendant demanded a jury trial, but the case involved the examination of long accounts and was a proper case for reference. (Civ. Code, § 292; Gen. Stat. 1901, § 4739.)

The defendant alleges error in the refusal to set aside the report of the referee, on the ground that time had not been allowed by the referee to prepare a bill of exceptions before filing his report. A bill of exceptions was allowed by the court upon the denial of this motion, which discloses the facts concerning the filing of the report, the notice thereof given by the referee, the efforts made to secure transcripts of the evidence, the motions for continuance and the rulings thereon, and the other proceedings before and at the time the report was confirmed, as set out in the statement above.

The bill of exceptions was presented and signed too late—the rule being the same as stated above with reference to a case-made (*The State v. Burton*, 70 Kan.

199), but treating the matters contained in it as properly presented here it appears that the defendant did not at any time ask to have the report withheld from the files until he could prepare a bill of exceptions containing the evidence to be presented to the referee for allowance, nor to have the report referred back to the referee, or the reference held open or reopened for that purpose. Nor did he ask for an order requiring the referee to report the evidence. It may be presumed that what the defendant desired to accomplish was to have the evidence presented to, and reviewed by, the court to determine whether it supported the findings of the referee against him. In this situation it would have been good practice to apply to the referee for the allowance of a reasonable time to prepare exceptions containing the evidence, which should be granted. (Civ. Code, § 295; Gen. Stat. 1901, § 4742; *Davis v. Finney*, 37 Kan. 165.) If in this case the time was insufficient to permit such application to be made, the defendant should have applied to the court or judge for an order requiring the referee to allow such time. If the report was filed before the application could have been heard, the court might still have referred the report back to the referee for this purpose. Or an order might have been asked for requiring the referee to report the evidence. But none of these steps was taken, and the evidence was not brought before the court.

The defendant contends that the evidence does not support the findings. As the proper steps to have the evidence reviewed in the district court were not taken, and the evidence was not before that court, it can not properly be reviewed here. We have, however, examined that part of the evidence abstracted by the defendant, and it appears to support the findings to which it relates. We must presume that this is true of the great mass of evidence not abstracted.

---

Cemetery Association v. Hanslip.

---

Complaint is made because transactions that had occurred eight to fourteen years before the suit was begun were investigated. The defendant ought not to complain of this, for he filed a stipulation expressly waiving the defense of the statute of limitations, thereby consenting to, if not inviting, an investigation of the accounts referred to in the petition, without regard to the lapse of time.

It is not necessary to consider whether the transcripts of testimony taken before the referee were properly authenticated as a part of the record under section 1 of chapter 320 of the Laws of 1905, for the evidence was never brought before the district court for its consideration.

The referee expressly found that the shortages were not caused by intentional wrong but arose out of errors in keeping the accounts. Upon a careful examination of the record and the evidence abstracted, no error is found in the proceedings. It is believed that the result would not have been different if all the evidence had been before the district court.

The judgment is affirmed.

---

THE OSAGE CITY CEMETERY ASSOCIATION, *Appellee*, v.  
JENNIE HANSLIP *et al.*, *Heirs of E. W. Hanslip*, *Appellants*.

No. 16,379.

SYLLABUS BY THE COURT.

1. **CORPORATIONS—Power to Issue or Sell Stock—Cemetery Association.** The charter of a cemetery association, incorporated in 1876, for the purpose of laying out, platting and maintaining a public cemetery or place of sepulture, contained a provision that the capital stock of the association should be \$600, to be divided into sixty shares of \$10 each. The full amount of the stock was subscribed and issued, and a board of directors was chosen who had general supervision of the af-

---

Cemetery Association v. Hanslip.

---

fairs of the association. The association purchased twenty acres of land, which was conveyed to it by the owner to be used as a cemetery, in payment for which he received thirty shares of the stock, and the association was to pay him one-half of the receipts from the sale of lots and expend at least \$300 in improving the land as a cemetery. The land was afterward platted, lots were sold for the purpose of sepulture, and it has ever since been maintained as a cemetery. *Held*, following *Davis v. Coventry*, 65 Kan. 557, that the association is a public and not a private corporation, and that it had no authority to issue or sell stock.

2. ——— *Deeds—Consideration—Executed without Authority—Cancellation.* In 1904 E. W. Hanslip became the owner of all except one of the shares of stock issued by the association referred to in the first paragraph, and, at a meeting of the board of directors, the officers of the association were authorized to execute and did execute deeds conveying to him all the property of the association, consisting of the cemetery lots unsold and twenty acres of unplatted land. The only consideration for the conveyances was that Hanslip was to transfer to the association his shares of stock and cancel an indebtedness which he claimed the association owed him on account of services rendered. *Held*, in an action by the association to cancel the conveyances, that they were void for want of consideration and because executed without authority.
3. PRACTICE, DISTRICT COURT—*Conclusions of Law by a Referee.* Conclusions of law made by a referee are not binding upon the trial court, and the court may, without formally setting aside the report, adopt the findings of fact and determine the law for itself.

Appeal from Osage district court; ROBERT C. HEIZER, judge. Opinion filed March 12, 1910: Affirmed.

J. H. Stavely, J. E. Jones, and C. S. Briggs, for the appellants.

Bennett R. Wheeler, John F. Switzer, C. E. Messerly, and J. P. McLaughlin, for the appellee.

The opinion of the court was delivered by

PORTER, J.: This action was commenced in December, 1906, to cancel and set aside two deeds by which the cemetery association conveyed to E. W. Hanslip all of

---

Cemetery Association v. Hanslip.

---

its real estate. While the action was pending Hanslip died intestate, and the action was revived against his heirs. The case was tried and the court gave judgment for the plaintiff. The heirs appeal.

In 1876 the Osage City Cemetery Association was incorporated under the laws of Kansas for "the purpose of laying out, platting, preparing, maintaining and ornamenting a public cemetery or place of sepulture." The charter contained a provision that the capital stock of the association should be \$600, divided into sixty shares of \$10 each. The full amount of the capital stock was subscribed and shares were issued. T. J. Peter subscribed for thirty shares, which were issued to him in exchange for twenty acres of land which he conveyed to the association, to be used as a cemetery, on the condition that he should receive half of the receipts from the sale of lots. The land was afterward platted, lots were sold for the purpose of sepulture, and the land has ever since been maintained as a cemetery.

In 1886 the association purchased twenty acres of additional land adjoining the cemetery, but the same was not platted and it is claimed by the appellants that no part of it was directly or indirectly dedicated to the public use for cemetery purposes, but that it has been continually used for agricultural purposes.

At the time of the organization a board of directors was chosen, which had general supervision of the affairs of the association. Hanslip was a member of the board from 1876, and had control and management of the cemetery, including the sale of lots. In 1904 he became the owner of all except one of the shares of stock, having purchased Peter's thirty shares and twenty-nine other shares. In February, 1904, a meeting of the board of directors was held, at which were present four of the seven members, including Hanslip. At this meeting the board accepted a proposition made by Hanslip to purchase all the property belonging to the association, and the officers of the association were

---

Cemetery Association v. Hanslip.

---

authorized to execute and did execute deeds conveying to him 350 cemetery lots remaining unsold, for the sum of \$600, and the twenty acres of unplatted lands, for the sum of \$700. The only consideration for the conveyances was that Hanslip agreed to transfer to the association his shares of stock and cancel an indebtedness which he claimed the association owed him on account of services rendered, amounting to \$374.72.

One ground urged against the validity of the conveyances is that Hanslip participated in the meeting of the board of directors, and, although it appears that he did not vote upon the question, it required his presence to constitute a quorum of the board. Numerous authorities are cited in support of the proposition that a director of a corporation is a trustee for the stockholders and can not be a party to a contract between himself and the association, and that a contract made under such circumstances as this was is voidable, if not absolutely void.

We are satisfied that the judgment and decree of the trial court should be affirmed, but it is not necessary to rest the decision upon the narrow ground that Hanslip lacked authority to participate in the proceedings of the board. The main propositions involved in the case are whether there was any consideration for the conveyances, and whether, conceding that a legal quorum of the board was present, it possessed authority to authorize the conveyances. The plaintiff's first claim is that there can be no capital stock in a cemetery corporation nor any shares of stock therein, and that the directors in this case misconceived their powers and illegally and without any authority issued so-called certificates of stock, which were of no value. The plaintiff's second claim is that if the stock was legally issued the board of directors had no right to convey its property to a stockholder in exchange for stock. The first point is ruled by the case of *Davis v. Coventry*, 65 Kan. 557. In that case the Fort Scott Cemetery Association,



---

Cemetery Association v. Hanslip.

---

organized under the same law, was held to be a public or quasi public corporation, and not a private corporation. It was further held that in such a corporation there are no stockholders; that any issue of stock as provided by the charter in this case is unauthorized, and a sale or assignment of such stock conveys nothing to the purchaser, because the lot owners alone control the business of such a corporation and have the right to elect its officers. We are unable to distinguish that case in principle from this, although a distinction is sought to be made on the ground that the stock in the Fort Scott association was not issued until long after the association had been engaged in business, and because in that case the land used for cemetery purposes was not procured in exchange for the issue of stock, as in the present case. In our view this makes no difference. A cemetery association organized as this was is not strictly a private corporation. Its lands are relieved from the payment of taxes on the theory that they are dedicated to a public use. It is not a public corporation in the sense that it is a part of the sovereignty of the state or an arm or agency of the government, nor does it possess the right of eminent domain, as some public corporations do. But it is at least a quasi public corporation, and public policy, as indicated by the decision in *Davis v. Coventry*, supra, will not tolerate the placing of the power to manage or control the affairs of such a corporation in the hands of mere stockholders, who may have no interest whatever in carrying out the purposes for which the association was permitted to be formed. Without extended comment, it is sufficient to say that we are satisfied with the reasoning upon which *Davis v. Coventry* was decided, and regard the law in this state as settled. There was no authority for the issuance of shares of stock in the association.

It is argued that the plaintiff's stockholders and directors must be regarded as *de facto* officers of the as-

---

Cemetery Association v. Hanslip.

---

sociation during the years they acted as such. This may be conceded, but the landowners had the right during all that time to manage and control the association and its property. The fact that they failed to do so and allowed the purported stockholders to manage its affairs can not alter the rights of the lot owners. The certificates of stock issued by the association were without value, and the agreement to transfer the shares of stock owned by Hanslip to the association in exchange for its property was without consideration. But even if the stock had been rightfully issued, and the board of directors was in the lawful control of the association, upon what principle can it be claimed that the board had the power to authorize the conveyance of all or part of the property of the association to a shareholder in exchange for his shares? There was no relation of debtor and creditor between the shareholder and the association. A corporation is not indebted to a stockholder for the actual or face value of his shares. And what did the association receive in exchange for its property? If when the transaction was completed Hanslip owned all the property and the association nothing but the fifty-nine shares of stock, of what value were the shares? No answer is suggested in the brief to any of these questions, nor are any authorities cited in support of the claim that such a transaction should be sanctioned by the courts.

The trial court referred the case to a referee for the purpose of stating an account between the plaintiff and Hanslip. The referee found that the association was indebted to Hanslip in the sum of \$124.87, but arrived at this result by giving him credit for his investment in fifty-nine shares of stock at face value, and allowing interest at the legal rate upon the investment from the time it was made. The court seems to have ignored the report of the referee and rendered judgment without taking any steps to set aside the report. It is claimed that this was error, and that the report, not

---

Cemetery Association v. Hanslip.

---

having been set aside, must be accepted as final. It was not necessary that the report be formally set aside; it was made up in part of conclusions of fact and in part of conclusions of law. The court was not bound by the referee's conclusions of law (*Martsolf v. Barnwell*, 15 Kan. 612; *The State v. Railway Co.*, 76 Kan. 467, 499), and it was competent for the court to accept the facts, about which there was really no controversy, and determine, as the court doubtless did, that the association was not indebted to Hanslip, either for the face value of his shares of stock or for interest on the amount he paid for them, and that the conveyances were void for want of consideration, as well as for lack of authority of the corporation to make them. Throwing out of the account the item of \$590 allowed for the purchase price of the shares, and the item of \$808.80 interest on the investment, there would be no indebtedness from the association to Hanslip. The balance would be the other way; and therefore the consideration for the conveyance of the unplatted twenty acres disappears. Since the conveyances were without consideration it becomes wholly unnecessary to consider numerous questions raised in the briefs respecting the power of a corporation to dispose of all its property and defeat the purpose for which it was created.

It is insisted, if the doctrine of *Davis v. Coventry*, 65 Kan. 557, is adhered to and the issue of stock of the association held to be unauthorized, that we should by some equitable rule hold that the certificates of stock are nevertheless evidences of an indebtedness due from the association to Hanslip, and that the judgment should be modified and the plaintiff ordered to restore to his heirs that which was found due him by the referee; and it is said that a failure to do this will deprive the appellants of property without due process of law, in violation of the fourteenth amendment to the constitution of the United States. There are several answers to this contention. For the purposes of this case it has

---

Cemetery Association v. Hanslip.

---

been determined that there was no indebtedness due from the association to Hanslip on account of the issue of the stock. Whether the judgment canceling the conveyances for want of consideration is a final adjudication of the question of indebtedness need not be determined here, as this was not an action for an accounting, but to set aside conveyances. No accounting is asked for in the answer. Hanslip himself is dead, and while his heirs are parties to the action his personal representatives are not. If the association is or was indebted to Hanslip, and the judgment here is not an adjudication to the contrary, an action in the name of the proper party can be maintained to recover what is due.

It is further argued that if it was *ultra vires* for the corporation to convey its property to Hanslip it was equally beyond the power of the association to take from the appellants the property which it is claimed is represented by the shares of stock, without giving compensation therefor. When the association was formed the twenty acres afterward platted belonged to T. J. Peter, who conveyed it to the association and agreed to accept in payment \$300 in stock and one-half of the receipts of the sale of lots, the association to expend in improvements at least \$300. The association seems to have performed its part of the agreement; it expended, doubtless, much more than \$300 upon the premises, and made the land more valuable as cemetery lots than it would have been if used for agricultural purposes. Through a mistake of law Peter was induced to accept in part payment for his land stock which possessed no value, and neither he nor the person to whom he transferred the stock has any recourse against the association. The report of the referee shows that under the contract \$2471.23 was paid by the association to the holders of the Peter stock as one-half of the proceeds from the sale of lots. It can hardly be claimed, therefore, that because the \$300 certificate of stock is now held to be invalid nothing was ever received in payment

---

Chase v. Barnes.

---

of the conveyance to the association of the twenty acres platted.

Finally, it is insisted that the judgment should be modified as to the conveyance of the twenty acres which has never been platted into cemetery lots, and authorities are cited holding that where a cemetery association takes the title to lands intending to use the same for cemetery purposes, but for some reason the plan is not carried out and the land has never been actually dedicated to cemetery uses, the association has the power to sell it. The principle relied upon would not apply to a case like the present, where the association is still engaged in maintaining a cemetery. The natural presumption is that the additional land was purchased with the intention of its being sometime used for cemetery purposes. Besides, it is not necessary to determine the power of the association to dispose of it. There was no consideration for the conveyance to Hanslip.

The judgment is affirmed.

---

STEVE CHASE, *Appellee*, v. E. F. BARNES, *Appellant*.

No. 16,380.

SYLLABUS BY THE COURT.

DAMAGES—*Breach of Warranty—Encumbrance—Sale of Leased Land—Ratification of Lease—Advanced Rental.* In March the owner of farm land leased it for the season, the tenant paying \$100 at the time on account of the hay crop, and agreeing to deliver two-fifths of the other crops. In June the owner conveyed the land, warranting against any encumbrance. The grantee accepted from the tenant two-fifths of the other crops and sued the grantor for damages, claiming their measure to be the value of the hay crop at the time the deed was executed. *Held*, that he was entitled to a recovery, but only to the amount of \$100.

---

---

Chase v. Barnes.

---

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed March 12, 1910. Modified and affirmed.

*W. J. Costigan*, for the appellant.

*F. M. Harris*, and *J. G. Johnson*, for the appellee.

The opinion of the court was delivered by

MASON, J.: On June 5, 1907, E. F. Barnes contracted in writing to convey a tract of land to Steve Chase, the grantee to have the crops for that year. On June 25 the contract was carried out by the execution of an ordinary warranty deed. Four months later Chase sued Barnes for \$150, pleading the contract and alleging that the defendant before delivering the land had sold a part of the crop, worth that amount. Barnes filed a motion to require the petition to be made more definite by describing the part of the crop that had been sold, and the manner of its sale. The motion was denied and he answered, pleading the deed and alleging that at the time of its execution the land was occupied by a lessee, Cornelius Crozier, under an agreement to pay \$100 for the hay crop (which payment had been made on taking possession, March 1,) and to deliver to the landlord two-fifths of the other crops; that Chase had recognized the lease and accepted from the tenant the landlord's share of the other crops. A trial was had without a jury. The contract and deed were not disputed. The evidence showed that the tenant had harvested and kept the hay crop, which was worth \$344; that it had been worth half that amount as it was growing in the field June 5; that the only other crop was corn, two-fifths of which the tenant delivered to Chase, who accepted it. The plaintiff recovered judgment for \$150 and interest, and the defendant appeals.

Barnes asserts that in order to have expressed the real intention of the parties the contract and deed should have reserved to him the hay crop, but he con-

---

Chase v. Barnes.

---

cedes that this defense is not open, and mentions it only as a justification for standing upon the strict letter of the law in other respects. His principal contention is that the sale of the hay to Crozier, having been made while the grass was growing, was void under the statute of frauds because not evidenced by any writing, and that Chase need not have recognized it; that having failed to insist upon his legal right against Crozier he had no recourse against Barnes. The flaw in this reasoning is that although the transaction between Barnes and Crozier is described in the petition as a sale of the hay for \$100, it was really, as it is properly designated in the answer, a lease of the premises, by the terms of which the tenant was to pay that amount in cash and to deliver a part of the corn crop. This lease was valid although not in writing, since it did not exceed a year in duration, and under it the tenant's right to the hay was unassailable.

In undertaking to convey the land free from encumbrance Barnes made himself liable for damages arising from the existence of the lease. The use of the property appears to have had no value except in connection with the crops, and as to them the measure of damage was their value at the time. Of course in strictness Chase had nothing to do with the crops or with the tenant. He simply had a personal claim against his grantor. In electing to accept the landlord's share of the corn he stepped into the shoes of Barnes so far as that particular crop was concerned. He must also be deemed by that act to have ratified the terms of the lease with regard to the amount of the rent, but he did not waive the right to insist that it should be paid to him. He did not so fully substitute himself for Barnes as to be compelled to treat payments of rent made in advance to Barnes as though made to himself. He was still entitled to demand that Barnes should account to him for the \$100. But he had no right to expect more than this. The lease being an

entirety, the cash payment apportioned to the hay may have been fixed with reference to the proportion agreed upon as the landlord's share of the corn, and Chase, having taken the advantage accruing from one part of the agreement, should in fairness abide by its terms as a whole, although the rest of it operated to his disadvantage.

For these reasons the judgment should be reduced to \$100 and interest. As so modified it will do substantial justice between the parties upon the facts. It is therefore unnecessary to inquire whether the plaintiff's petition was framed so as to present with technical accuracy the grounds of his recovery, or whether it was subject to the motion that was directed against it, since the defendant was in no way misled or cut off from a full presentation of his side of the controversy. (Code 1909, § 581.)

The judgment is affirmed with the modification indicated.

**EMMA BLANCHE MCCORMICK, Appellee, v. JOSEPH L. MCCORMICK, Appellant.**

No. 16,381.

SYLLABUS BY THE COURT.

**DIVORCE** — *Foreign Judgment—Publication Service—Collateral Attack—Fraud—Alimony—Res Judicata—Residence—Jurisdiction.* In December, 1907, the defendant obtained a divorce from his wife, the plaintiff, in the circuit court of Jackson county, Missouri, according to the laws of that state. The wife was residing at the time in Shawnee county, Kansas, and was served by publication only. She knew of the pendency of the action, but made no appearance. The decree made no reference to alimony or property rights. In July, 1908, the plaintiff brought an action for alimony in Riley county, Kansas, where the defendant had real estate which was sequestered to pay the judgment sought. The defendant pleaded the Missouri decree and offered it in evidence at the trial.

82	31
82	161
82	341



## McCormick v. McCormick.

**Held:** (1) The present action was properly instituted in Riley county. (2) The Missouri court had jurisdiction to hear the cause before it even if the allegations of the petition were false, and to render the decree even if moved to do so by false testimony. (3) The Missouri decree was not open to collateral impeachment on the ground of fraud. (4) By chapter 184 of the Laws of 1907, which took effect on March 21, 1907, the legislature made the recognition and enforcement of foreign divorce decrees based on publication service obligatory in this state, and placed such decrees on the same basis as judgments of the courts of this state with respect to all persons, and the status of all persons, affected. (5) Giving the decree of the Missouri court the force it would have if rendered by a court of this state, it was as effectual as if it had been founded on personal service. It dissolved the marriage, and the plaintiff was no longer the defendant's wife. The cause was open for the consideration of the subject of alimony. No application for alimony having been presented and no award having been made, the judgment is a bar to the recovery of alimony now, although the matter was not specifically referred to in the decree. The facts embraced in the issues presented by the petition on which the decree rests are *res judicata*. The district court of Riley county had no authority to enforce the matrimonial obligation upon which the right to alimony depends, and the plaintiff no longer has any of the rights which a wife possesses respecting her husband's property. (6) The case of *Roe v. Roe*, 52 Kan. 724, approved and followed. The case of *Rodgers v. Rodgers*, 56 Kan. 483, distinguished.

Appeal from Riley district court; SAM KIMBLE, judge. Opinion filed March 12, 1910. Reversed.

*Charles Blood Smith, Robert J. Brock, and Samuel Barnum*, for the appellant.

*John E. Hessin, Philip C. Wilson, and William F. Schoch*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action in the district court was brought by Emma Blanche McCormick to obtain alimony. Judgment was rendered in her favor and the defendant, Joseph L. McCormick, appeals.

The petition was filed on July 23, 1908, and shows the

---

McCormick v. McCormick.

---

parties were married in 1889 in Riley county, Kansas, where they continued to reside until 1905. About that time they removed to Kansas City, Mo. In September, 1907, the plaintiff removed to Topeka, in Shawnee county, Kansas, where she resided when the suit was begun. The defendant owned land in Riley county which the plaintiff sought to appropriate, but he continued to reside in Missouri. The causes of action stated were extreme cruelty, gross neglect of duty, abandonment and adultery, the facts being set forth in detail. The plaintiff justified her separation from the defendant and her removal to Kansas on the ground of his misconduct. The prayer was for alimony in the sum of \$15,000, for a receiver for the land in Riley county, for a division of property, and for other relief. A receiver was appointed who took possession of the land, and the defendant was served by publication.

The defendant answered, admitting the marriage and the residence of the parties as stated, but he challenged the venue and denied the charges of misconduct contained in the petition. As a specific defense it was alleged that on December 10, 1907, the defendant was divorced from the plaintiff by a decree of the circuit court of Jackson county, Missouri, a court having jurisdiction of the subject matter and of the parties, which decree remained unreversed and in full force and effect, and consequently that the plaintiff was not the defendant's wife. As a further defense, and as a bar to the plaintiff's cause of action, the defendant pleaded in full the proceedings and judgment in the divorce suit in Missouri, and the statutes of that state governing such cases, expressly invoking the benefit and protection of section 1 of article 4 of the constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. The statutes of Missouri set out in the answer prescribe the causes for which a divorce may be obtained, vest jurisdiction

over the subject of divorce in the circuit court of the county where the defendant resides, regulate the pleadings, process and proceedings, and among such regulations provide for service by publication on nonresident defendants. The duly authenticated record of the proceedings and judgment exhibited in the answer show full compliance with these statutes, including valid service by publication. The petition stated that Joseph L. McCormick was, at the time the petition was filed, and for more than one whole year prior thereto had been, an actual resident and citizen of Jackson county, in the state of Missouri, and had continuously resided during all of that time in that county and state. A cause of action for divorce on the statutory ground of indignities rendering his condition intolerable was stated, and among other allegations appeared the following:

"Plaintiff further alleges that on or about the 26th day of September, 1907, the said defendant, without the knowledge or consent of this plaintiff, packed up the household goods belonging to this plaintiff and shipped them to some point unknown to this plaintiff, and took with her a horse and carriage belonging to this plaintiff, and took the children of plaintiff and left for some place unknown to this plaintiff, and that defendant has absconded and absented herself from her usual place of abode in this state so that the ordinary process of law can not be served upon her in the state of Missouri."

The decree which was rendered reads as follows:

"Now, on this day comes plaintiff in person and by attorney, and defendant, although lawfully summoned by publication, proof of which is made and filed herein, comes not, but makes default.

"This cause now coming on for trial is submitted to the court upon the pleadings, and after having heard the evidence the court finds that the allegations in plaintiff's petition are true; that plaintiff is the injured and innocent party and entitled to the relief prayed.

"Wherefore it is adjudged and decreed by the court that the bonds of matrimony heretofore contracted be-

tween plaintiff and defendant be and the same are hereby dissolved and for naught held, and plaintiff forever freed from the obligations thereof.

"It is further ordered and adjudged by the court that the costs herein be paid by, and that execution therefor issue against, the defendant."

The reply to the defendant's answer consisted simply of a general denial.

On the trial the plaintiff produced sufficient proof to sustain the causes of action stated in the petition, and to show that her separation from the defendant was warranted because of his wrongful conduct. The defendant offered to show that his attorneys in the Missouri suit duly advised attorneys representing the plaintiff in her difficulties with her husband of the pendency of that action, sending them a copy of the publication notice containing the date she was called upon to answer. The defendant further offered in evidence a letter of the plaintiff's attorneys acknowledging receipt of an acceptance of service, sent them by defendant's attorneys for signature, and declining to sign the same. This evidence was excluded, and the defendant duly excepted. The plaintiff admitted she left Kansas City, Mo., without the defendant's knowledge and without telling him where she was going, and admitted she did not notify him, after she arrived in Topeka, where she was. She also admitted she learned of the suit pending against her in Jackson county, Missouri, in October or November, 1907. The decree in the Missouri case was read in evidence over the plaintiff's objection.

The court found for the plaintiff and granted her alimony in the sum of \$8000, together with attorney fees in the sum of \$500. One ground of the decision was that under the rule announced in *Haddock v. Haddock*, 201 U. S. 562, the effect of a foreign decree of divorce is to be determined by the facts of each case. The court also said:

"That where the jurisdiction of a sister state has been invoked and made operative by a direct or indi-

---

McCormick v. McCormick.

---

rect fraud, without the existence and operation of which the jurisdiction would not have moved, the result of the exercise of that jurisdiction is void, and that upon the proposition that the integrity of the courts in the administration of justice demands that any moving of the court procured by means of fraud will be abjured promptly by that court, and that as other courts act upon the presumption that the courts will always abjure fraud, this court presumes that the circuit court of Jackson county, Missouri, under the facts as they are disclosed here, would abjure instantly any exercise of jurisdiction and deny authority for its supposed acts."

It was further stated that the facts show the existence of fraud on the part of the defendant in filing a false petition in the Missouri court, and that no attempt was made to secure personal service on the plaintiff, who was the defendant in that action. The conclusion was:

"For such reason the action of the circuit court of Jackson county, Missouri, in my judgment, does not estop or bar the exercise of the jurisdiction of this court; that it was procured by the fraud of the plaintiff, and that he knew it was false and fraudulent when he procured it."

The court also held that the action was properly brought in Riley county.

The pleadings presented no issue of fraud in obtaining the Missouri decree. The plaintiff did not attack the decree on the ground of fraud, which must be pleaded whenever relied on, and the defendant was not called upon to answer or defend against any such charge. The attempted impeachment of the decree was purely collateral, and consequently can not be sustained.

The circuit court of Jackson county had jurisdiction over the subject matter of the action. Service was made upon the plaintiff according to the method prescribed by statute. The sole question to be tried was,

Was the petition filed by McCormick false? The court sat for the single purpose of sifting that specific subject, and, whether the petition were false or true, full jurisdiction existed to find out about the matter. If the law were otherwise a remarkable situation would be presented. The court, with a petition for divorce before it stating a perfect cause of action on its face, but false in fact, would have no power to summon witnesses, administer oaths or take testimony to see if the petition were true. Although instituted for the purpose of detecting falsehood and circumventing fraud in divorce cases, it could not take a single valid step to that end. If it should proceed to try the case and should find the allegations of the petition to be either false or true, its judgment would be a nullity because it had no power to begin the investigation. In short, it would be impossible for a court to render a binding judgment unless it had a petition free from falsehood to act upon from the beginning.

In the case of *Larimer v. Knoyle*, 43 Kan. 338, a divorce had been granted on service by publication. In another action in another court it was shown that the petition, the affidavit for service by publication and the affidavit in lieu of mailing a copy of the petition were all false. The court held that jurisdiction was not affected and the judgment was not void. Referring to the falsity of the petition as a nullification of the proceeding, the court said:

"We shall pass over the claim that the judgment in the divorce case is void for the reason that the allegations of the plaintiff's petition in that case were untrue and false, for we do not think it has ever been held by any court that a judgment was absolutely void because the allegations contained in the plaintiff's petition were in fact untrue or false." (Page 347.)

In the case of *In re Wallace*, 75 Kan. 432, the court held, citing numerous authorities, that when jurisdiction depends on a fact litigated and determined in the

---

McCormick v. McCormick.

---

action itself, the judgment rendered is conclusive evidence of the existence of the fact and of jurisdiction until it is reversed or vacated in a direct proceeding for the purpose, and that such judgment can not be contradicted in a collateral proceeding. The law is the same in Missouri.

"All of the authorities hold that a judgment of a court having jurisdiction of the subject matter of controversy and of the parties can not be impeached collaterally in an action between the same parties or their privies in law, upon a point put in issue and decided, but that the party desiring to avoid the judgment must apply to the court which pronounced it to have it vacated. *Callahan v. Griswold*, 9 Mo. 784; *Field v. Sanderson*, 34 Mo. 542." (*Johnson v. Realty Co.*, 167 Mo. 325, 339.)

The supreme court of the United States holds the same opinion. In the case of *Michaels v. Post*, 88 U. S. [21 Wall.] 398, an assignee in bankruptcy sued a preferred creditor for property transferred. The defense was that the petition upon which the adjudication in bankruptcy was made was filed by one who had released his claim, who was not, therefore, a creditor, whose petition was accordingly fraudulent, and that, in consequence, the adjudication was void. The court said that jurisdiction is conferred if the petition which is presented sets forth the required facts, and the court, upon proof of service, finds the facts set forth in the petition to be true.

Since the circuit court of Jackson county, Missouri, had as ample jurisdiction to begin a hearing to ascertain the truth or falsity of the charges contained in the petition as the district court of Riley county, Kansas, possessed, all that followed was exercise of jurisdiction. The court might be deceived by falsehood and perjury, just as the Kansas court might be deceived by the same means, but if it were deceived it did not lose jurisdiction to exercise the power it possessed to adju-

dicating the controversy. A judgment procured by false or perjured testimony is not open even to a direct attack on that ground, when the testimony relates to an issue raised by the pleadings and tried out at the hearing. (*Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, and authorities cited in the opinion.)

Since the Missouri court had jurisdiction to investigate whether McCormick's petition for a divorce were false or true, to pass upon the testimony offered to sustain it, and to enter a decree according to its view of the proof, that decree is not open to collateral attack on the ground of fraud in a suit for alimony in Kansas. Expressions may be found in the law books to the effect that fraud vitiates whatever it touches, including judicial acts, which is true enough, subject to the limitations stated in the *Blue Rapids* case and provided the proper remedy be employed. In some cases courts have suffered judgments to be impeached collaterally on the ground of fraud, but the procedure is unsound. If allowed to prevail the litigation could never be brought to a close. It could always be alleged that the last judgment was procured by fraud. The rule is necessarily the same for judgments of sister states and of this state, and for judgments based on publication service as well as those based on personal service. So long as notice by publication confers lawful authority on the court to hear and determine, the determination is binding until set aside in a direct proceeding. When jurisdiction has attached, the fraud of a party in procuring an irregular exercise of jurisdiction does not destroy jurisdiction, and nothing but want of jurisdiction is available on collateral attack.

In the case of *Simpson v. Kimberlin*, 12 Kan. 579, the court said:

"Every judgment, whether obtained through fraud or not, is valid and binding and conclusive as to all parties thereto, and their privies, until reversed, vacated, set aside, or perpetually enjoined by some pro-



ceeding instituted directly for that purpose." (Syllabus.)

In *Head v. Daniels*, 38 Kan. 1, judgment was rendered against a nonresident, served by publication only, finding an indebtedness to be due and ordering a sale of attached real estate. The sale was made and confirmed and a sheriff's deed was issued. Afterward the proceedings were attacked collaterally in an action of ejectment to recover the land. Discussing the subject of service the court said:

"The notice was in all respects, except as above mentioned, formal and sufficient; and we think it was sufficient in every respect, and valid. It was sufficient to advise Mrs. Denton of the nature and character of the action brought against her, and of her interests which were sought to be affected by the action, and was to her a substantial compliance with all the requirements of the law. This was certainly sufficient." (Page 7.)

The law relating to collateral attack was then stated as follows:

"In conclusion, we would say that collateral attacks upon judicial proceedings are never favored; and when such attacks are made, unless it is clearly and conclusively made to appear that the court had no jurisdiction, or that it transcended its jurisdiction, the proceedings will not be held to be void, but will be held to be valid." (Page 12.)

In the case of *Davis v. Hagler*, 40 Kan. 187, a guardian appointed in Illinois, and his ward, a resident of that state, removed to Kansas. Being in financial distress, the ward obtained a sum of money from the guardian and gave the guardian a receipt in full. On the strength of the receipt the guardian made a settlement with the probate court in Illinois and obtained his discharge. The court held the judicial proceedings in Illinois could not be collaterally attacked on the ground of fraud, in a suit commenced in Kansas.

In addition to what has already been quoted from *Larimer v. Knoyle*, 43 Kan. 888, the court further said:

"We do not think that she could treat the judgment as an absolute nullity, and void in a collateral proceeding, merely because of the falsity of the petition and the two affidavits.

" 'A divorce granted by the court of the domicile of both parties is valid everywhere under the constitution of the United States, and under the principles of international law, although the defendant has neither been summoned nor voluntarily appeared, provided that the laws of the parties' domicile as to notice by publication or otherwise have been complied with.' . . . 'Want of jurisdiction in the court passing it is the only cause which renders a decree of divorce absolutely void; fraud does not, nor does irregularity.' " (Pages 349, 350.)

In *Morris v. Sadler*, 74 Kan. 892, it was said that the principle of law here involved is so well established that no necessity existed for its formal promulgation again.

It is not quite apparent why the district court made the point that personal service was not made in Kansas on the defendant in the Missouri case. Such service was not essential to jurisdiction, granting it to be permissible under the laws of Missouri, and would have conferred no higher or greater authority on the court to hear and determine the cause than service by publication. True, such service gives actual notice, but the defendant in the Missouri proceeding admits she knew the suit was pending before judgment was rendered. Fraud can scarcely be predicated upon the choice of one of two equally lawful courses, but if the failure to make service personally carried an implication of secrecy the plaintiff in that case did his best to show that such implication was unwarranted. He offered proof tending to show an effort to obtain an acceptance of service, and that he sent the defendant a copy of the publication notice. True, this correspondence was between the attorneys for the respective parties, but under the circumstances due propriety required that it be so. The

---

McCormick v. McCormick.

---

tendered evidence was relevant to the questions of actual notice to the defendant and the good faith of the plaintiff, and under the court's theory of the case ought to have been received.

Another ground upon which the district court refused to recognize the Missouri decree was that under the decision in *Haddock v. Haddock*, 201 U. S. 562, the effect of a foreign decree of divorce is to be determined by the facts of each case. The facts in the Haddock case were these: A husband and wife were domiciled in the state of New York. The husband removed to the state of Connecticut and acquired in good faith a domicile in that state. The wife remained in New York. After a lapse of years the husband procured a decree of divorce from the wife in a Connecticut court, according to the laws of that state, on the ground of desertion. The wife was served by publication, and not personally. In rendering the decree the court found that the complaint and writ had been duly served and that the allegations of the complaint had been sustained. Subsequently the wife sued the husband for a divorce in New York and obtained personal service upon him there. He pleaded the decree of the Connecticut court in bar of the action and offered such decree in evidence at the trial. The evidence was rejected by the referee who heard the case. The wife was granted a divorce and alimony and the judgment was affirmed by the highest court of the state of New York. On appeal to the supreme court of the United States it was held that the trial court did not violate the full faith and credit clause of the constitution of the United States in refusing to admit the Connecticut decree in evidence. The court said:

"Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled

to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause." (Page 605.)

The decision in *Haddock v. Haddock* was rendered on April 12, 1906. It immediately arrested public attention throughout the nation, and, whether warranted or not, great anxiety was felt in many quarters respecting the social consequences which might follow from it. For the purpose of averting any possible disaster, due either to the decision itself or to misapprehension of its doctrine, and for the purpose of establishing the law and policy to be observed by the courts of this state, the legislature enacted the following statute, which took effect March 21, 1907:

"Any judgment or decree of divorce rendered upon service by publication in any state of the United States in conformity with the law thereof shall be given full faith and credit in this state, and shall have the same force with regard to persons now or heretofore resident or hereafter to become a resident of this state as if said judgment had been rendered by a court of this state, and shall, as to the status of all persons, be treated and considered and given force the same as a judgment of the courts of this state of the date which said judgment bears. (Laws 1907, ch. 184, § 1.)

It is perfectly clear that this statute was intended to make the recognition and enforcement of foreign divorce decrees based upon substituted service obligatory in this state. The option left by the decision in *Haddock v. Haddock* to each state to give to such decrees within its own borders whatever efficacy they may be entitled to, consistent with its public policy, was exercised by the legislature, and such decrees were placed upon the same basis as the judgments of our own courts. The Missouri decree in controversy was rendered on December 10, 1907. The present action was begun on July 23, 1908, and the decree was presented to the district court for its consideration on November

30, 1908. Very clearly the statute governed the case, and the decree should have been given the same force and effect upon Emma Blanche McCormick as if it had been the decree of a Kansas district court rendered on December 10, 1907. What would have been its force and effect under these conditions?

The question is fully and specifically answered by the decision rendered in *Roe v. Roe*, 52 Kan. 724. In that case the woman brought a suit for divorce and alimony in Montgomery county, Kansas. The man pleaded a decree of divorce from her obtained in Colorado on publication service. The decree made no reference to the subject of alimony or property rights. On the trial the district court sustained the Colorado decree, but awarded alimony. The defendant appealed, and the only question for consideration in this court was the right of the woman to alimony under the circumstances. The laws of Colorado had not been pleaded or proved, and the court, acting on the presumption that such laws are the same as those of this state, proceeded to determine the rights of the parties accordingly. The material portions of the opinion follow:

"Under section 646 of the civil code, it is provided: 'If the divorce shall be granted by reason of the fault or aggression of the wife, the court shall order restoration to her of the whole of her property, lands, tenements and hereditaments owned by her before, or by her separately acquired after, such marriage, and not previously disposed of, and also such share of her husband's real and personal property, or both, as to the court may appear just and reasonable; and she shall be barred of all right in all the remaining lands of which her husband may at any time have been seized.'

"Section 647 contains the provision that 'A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other, except in cases where actual fraud shall have been committed by or on behalf of the successful party.'

"In the case of *Lewis v. Lewis*, 15 Kan. 181, it was held: 'Where a decree of divorce was duly and legally entered, after service by publication, and the mailing of a copy of the petition and publication notice, as required by section 641 of the code, held, that the defendant could not come in under section 77 of the code, and upon the showing of want of actual notice have the decree set aside and be let in to defend.

"Where the decree of divorce contained no other order concerning property than one barring defendant of all right and interest in the property of plaintiff, held, that this order must stand with the decree, and, the decree being undisturbed, the order could not be set aside.' " . . . "It is the general policy of the law, strongly adhered to by this court in its prior decisions, to require every question properly involved in any suit to be disposed of by the judgment finally rendered in the case. (*Comm'rs of Marion Co. v. Welch*, 40 Kan. 767; *Bierer v. Fretz*, 37 Kan. 27; *Railroad Co. v. Beebe*, 39 Kan. 465; *Westbrook v. Mize*, 35 Kan. 299; *Railroad Co. v. Comm'rs of Anderson Co.*, 47 Kan. 766.) Under the law of Kansas, the court rendering judgment in an action for divorce is authorized on a proper showing to grant alimony, whether the divorce be allowed or not. If the divorce is granted, it operates as an absolute dissolution of the marriage tie. Whatever orders with reference to alimony or a division of the property are desired by either party may then be considered and determined by the court. If they may be so considered and determined, and a party neglects to require such determination, the judgment is as full and complete a bar as if the question had been fully tried and determined. Within the case of *Lewis v. Lewis*, supra, though the rule declared may sometimes work great hardships, a judgment on service by publication is as effectual as where personal service is made. We conclude, then, that, under the evidence and the finding of the court sustaining the Colorado divorce, the parties were not husband and wife either at the time the suit was commenced or when it was finally determined, and that the court was without power to grant alimony to the plaintiff while sustaining the Colorado divorce made so long before." (Pages 727, 728.)

This declaration of the law is consistent with numer-

---

---

McCormick v. McCormick.

---

ous earlier and later decisions. In *Mitchell v. Mitchell*, 20 Kan. 665, the opinion reads:

"By the dissolution of the marriage the relation of husband and wife, between the parties, ceases to exist. The divorce granted at the instance of one party operates as a dissolution of the marriage contract as to both. The subsequent relations of the parties are the same as though no marriage had ever been had." (Page 667.)

In the case of *Baughman v. Baughman*, 32 Kan. 538, the syllabus reads:

"Under the statute in this state a decree of divorce granted at the instance of one party operates as a dissolution of the marriage contract as to both, and the decree is only incumbered with the statutory restriction that during the six months after the rendition thereof and the pendency of the proceedings to reverse the same it is unlawful for either of the parties to marry."

In the case of *Daleschal v. Geiser*, *Guardian*, 36 Kan. 374, a divorced woman claimed, after her former husband's death, an interest in his real estate not mentioned in the divorce decree. The court said:

"At the commencement of the partition proceedings it seemed to have been the belief of the attorney of Antonia Daleschal that, notwithstanding the divorce granted her, she was entitled to a portion of the real estate of which Joseph Bertsch died possessed, either as an heir at law or a dower interest; that if the decree of separation did not, in express terms, bar her right of inheritance or dower, she would still have her share of the realty, the same as if such a decree had never been rendered; that a divorce affected personal relations, but did not property rights, unless so expressed in the judgment. This was a misconception of the law." (Page 377.)

In the case of *Chapman v. Chapman*, 48 Kan. 636, a wife residing in Ohio obtained a divorce by publication service against her husband who resided in Kansas. The court said:

"The effect of the divorce obtained by plaintiff from John B. Chapman was to exclude her from any interest

in his property, not specially mentioned, reserved or provided for in the decree of divorce. (*Mitchell v. Mitchell*, 20 Kan. 665; *Daleschal v. Geiser*, 36 Kan. 374; *Crane v. Fipps*, 29 Kan. 585.) . . . The jurisdiction over a divorce cause, properly brought in a court under the statutes of the state where the plaintiff actually resides, gives the court authority to nullify or dissolve the marriage status, although it has obtained no control over the person of the defendant, excepting by publication. Mrs. Clarinda Chapman had her domicile in Ohio at the time of the divorce proceedings. The court, under the statute of that state, had jurisdiction, and the proceedings therein render the divorce complete. After the decree of divorce Mrs. Chapman was not legally the wife of John B. Chapman, in Ohio or in Kansas." (Pages 638, 639.)

In the case of *Wesner v. O'Brien*, 56 Kan. 724, the syllabus reads:

"The district court has power to award land as alimony in a divorce proceeding based only on constructive notice to the defendant, where the plaintiff alleges sufficient grounds for divorce and alimony in the petition, and asks to have such land appropriated as alimony, and where the publication notice contains a particular description of the land sought to be appropriated and the nature of the relief demanded."

In the opinion it was said:

"The theory that the limit of the power of the court in a divorce suit where there is no personal service is the dissolution of the marriage does not obtain in this state. In the early case of *Lewis v. Lewis*, 15 Kan. 181, it was held that upon such service a decree barring the defendant of any interest in the plaintiff's property was valid and binding." (Page 729.)

In the case of *Phillips v. Phillips*, 69 Kan. 324, a wife brought an action for alimony in Butler county, in this state, on the ground of extreme cruelty and gross neglect of duty. While the action was pending the husband sued her for divorce in Oklahoma. She filed a cross-petition there for a divorce and for alimony, on the grounds stated in the alimony petition filed in Kansas.



---

McCormick v. McCormick.

---

The Oklahoma court found that she had been guilty of desertion, that the husband was without fault, granted him a divorce, and reserved the question of property rights. The husband then pleaded this decree in bar of the action for alimony in Butler county. The district court of that county refused to recognize the decree and awarded the wife the relief prayed for. On appeal this court reversed the judgment, holding that the charges contained in the petition for alimony had been adjudicated.

In the case of *Hatch v. Small*, 61 Kan. 242, the court said:

"Unless the court granting the divorce, in exercise of authority conferred, makes a division of the property or awards alimony, the decree ends all matrimonial obligations and any right which either has acquired by the marriage in the other's property." (Page 245.)

In the case of *Durland v. Durland*, 87 Kan. 784, the opinion reads:

"The prohibition upon marriage within six months, however, was the only limitation upon the judgment as an utter annihilation of the former marital status. If no appeal was taken the ties which had bound the individuals together were absolutely and unqualifiedly broken asunder. The parties were each as fully absolved from every marital right and duty and consequence as they were before marriage, and were fully restored to the freedom they enjoyed before marriage in every respect, except they could not marry for six months. Indeed had the legislature withheld that privilege forever, still no element of the relation of husband and wife would have continued to exist." (Page 740.)

In the case of *Roberts v. Fagan*, 76 Kan. 536, a wife residing in this state procured a divorce from her husband on publication service. The opinion reads:

"The service made invested the court with full jurisdiction to grant a divorce. A valid divorce having been granted, the parties were no longer husband and wife, and thereafter their property rights were the same as before their marriage. The divorce extinguished what-

ever rights either might have had in the property of the other on account of the marriage relation." (Page 540.)

Applying these decisions to the present case the following conclusions are inevitable: The judgment of the Missouri court, rendered on service by publication, was as effectual as if it had been rendered on personal service. It operated to dissolve the marriage tie, and absolved each party from every marital right and duty. The defendant in that suit was no longer the plaintiff's wife, each one was as free as before marriage, and thereafter they bore toward each other the same relations as if the marriage had never occurred. The court was not limited to the mere dissolution of the marriage, but had authority to determine the question of alimony and make an award to the defendant. The cause being open for the claim of alimony, it should have been made there. No application for alimony having been presented, the decree is as complete a bar as if evidence had been introduced and a decision rendered thereon. It is not necessary that the decree should refer in express terms to alimony in order to have this effect. It excludes everything not expressly mentioned or reserved in it. The matters of who was innocent, who was injured and who was responsible for the separation are *res judicata*. The district court of Riley county was without authority to enforce the matrimonial obligation upon which the right to alimony depends, and the plaintiff no longer has any of the rights which a wife possesses respecting her husband's property.

The statute of 1907 does not undertake to make recognition of foreign decrees disposing of real or personal property situated in this state obligatory, but no question of that kind is here involved. All the consequences of the Missouri decree which have been enumerated are personal to the present plaintiff. The decree did not attempt to bind property, and the present action relates to alimony. Real estate is affected only as it affords a

---

McCormick v. McCormick.

---

means whereby a judgment for alimony may be satisfied, and the right to alimony depends upon the status of the plaintiff after the rendition of the Missouri decree.

The plaintiff bases her right to attack the Missouri decree collaterally upon the decision in *Litowich v. Litowich*, 19 Kan. 451. The first paragraph of the syllabus distinguishes the case:

"A judgment rendered by a probate court of Utah territory, attempting to dissolve the marriage relation existing between a husband and wife who had neither of them ever resided there or been within the territory, and being rendered without any actual notice to the wife, is void absolutely and entirely for want of jurisdiction in the court to render such a judgment."

The plaintiff argues that she is entitled to alimony under the decision in *Rodgers v. Rodgers*, 56 Kan. 488, the syllabus of which reads thus:

"The courts of a sister state, if authorized by law, may dissolve the marriage relation between a husband domiciled there and a wife residing in this state on service by publication, although unknown to her, but such courts have no power to settle the title to lands in this state, nor to control the custody of children residing here; and where a husband deserted his wife and children, leaving them in the occupation of a homestead here, and, going to another state, procured a divorce in accordance with law, but without actual notice to the wife, held, that though such decree was effectual as to the status of the parties, it was not a bar to the allowance of alimony in the homestead, nor as to the custody of the children, in a subsequent action brought by the wife here."

This decision is based upon *Cox v. Cox*, 19 Ohio St. 502, and *Cook v. Cook, imp.*, 56 Wis. 195. It is supported by *Thurston v. Thurston*, 58 Minn. 279, *Cochran v. Cochran*, 42 Neb. 612, and *Eldred v. Eldred*, 62 Neb. 613, and to some extent by *Graves v. Graves*, 36 Iowa, 310, and *Van Orsdal v. Van Orsdal*, 67 Iowa, 35.

No reference was made in *Rodgers v. Rodgers* to *Roe v. Roe*, 52 Kan. 724, or to any other Kansas de-

cision touching the questions covered by the syllabus quoted. No attempt was made to harmonize the declarations made with previous utterances of the court, and the case has not been cited as authority in any subsequent decision. Whether the doctrine announced be sound or unsound need not now be determined. The facts are so dissimilar from those under review that the case has no application.

In *Rodgers v. Rodgers* the wife's homestead rights were involved, and the case was treated as one affecting the title to land in this state. This assumption, if valid, would create some confusion, but it was made and was utilized in declaring the law of the case in the syllabus. The foreign divorce was unknown to the wife, and was rendered without actual notice to her. The husband deserted the wife and established a separate domicile in the foreign state. In this case no homestead rights are involved, the title of the plaintiff to any land she may have in Kansas is not affected, and no extraterritorial effect is claimed for the Missouri decree in that regard. Proof was tendered showing diligent and successful effort to apprise the plaintiff of the Missouri suit, and she admitted she had actual knowledge of its pendency. The matrimonial domicile of both parties was within the jurisdiction of the Missouri court. Therefore the two cases are unlike in all essential features, except that both were instituted to obtain alimony. In the opinion in the *Rodgers* case it is said that a wife may have no opportunity to set up a claim for alimony in her husband's suit for a divorce in a foreign state. The plaintiff in this case had that opportunity. It is said the court of a foreign state would not have power to deal effectively with the question of alimony, even if the wife had knowledge of the suit. This statement evidently applies to cases like the one then under decision, where homestead rights or the title to land is involved. Even in such cases no reason is apparent why a conveyance might not be ordered, and

its execution be compelled by contempt process. (See *Fall v. Eastin*, 215 U. S. 1.) It is likely to occur in any case that the bulk of the husband's property will lie outside the state of his domicile. No disability to do justice in the matter of alimony has so far been imputed to the courts of this state, and the statute of 1907 is framed on the theory that the courts of other states have equal facilities and powers. Finally, the opinion in the *Rodgers* case proceeds upon the declared principle that, although the parties are divorced, the relation of husband and wife may be regarded as still existing for the purpose of awarding alimony. It is now impossible to resort to such a fiction in view of the statute of 1907.

The defendant insists that notwithstanding the decision in the *Haddock* case the district court was obliged to give full faith and credit to the Missouri decree under the constitution of the United States, and claims that the case of *Atherton v. Atherton*, 181 U. S. 155, is controlling. It is not necessary to discuss the case in this broad constitutional aspect, since by virtue of the law and policy of this state as declared in the statute of 1907 and in the decisions of this court the defendant obtains all the relief he desires.

The action was properly commenced in Riley county. It is not necessary that the plaintiff in a suit for alimony should be a resident of the state or of any county in the state (*Litowich v. Litowich*, 19 Kan. 451, 453), and the action may be commenced in any county where the defendant may be summoned, or where he has property subject to appropriation to pay the judgment if he be a nonresident.

The judgment of the district court is reversed and the cause is remanded for a new trial.

GAIUS M. BRUMBAUGH, *Appellee*, v. S. T. WILSON *et al.*,  
*Appellants*.

No. 16,382.

SYLLABUS BY THE COURT.

1. **JUDGMENTS** — *Validity—Default—Petition Demurrable—Collateral Attack*. In a collateral attack on a judgment rendered on a default the judgment will not be held void, even if the petition upon which it was rendered does not state facts sufficient to constitute a cause of action.
2. ——— *Record of the Proceedings Lost—Secondary Evidence—Presumptions*. Where the proceedings of a court are attacked as void years after they occurred, and where the primary evidence of such proceedings is shown to have been lost or destroyed, the court may consider such secondary evidence as may be presented, and may entertain every reasonable presumption consistent with such evidence in support of the validity of such proceedings.

Appeal from Hodgeman district court; CHARLES E. LOBDELL, judge. Opinion filed March 12, 1910. Affirmed.

STATEMENT.

ON March 18, 1901, the appellee brought an action in the district court of Hodgeman county to recover a judgment on a note of \$600 and to foreclose a mortgage given on land in that county to secure the payment of the note. The appellants were made parties defendant, and the petition alleged that since the execution of the note and mortgage they had purchased the lands, and by the terms of their deed therefor had assumed the payment of the note and mortgage. On March 18, 1901, a summons was duly issued to the sheriff of Hodgeman county for all of the defendants, and returned "not found in my county, after making diligent search, as to each of said defendants." A proper affidavit for service by publication was filed, and due publication and proof thereof was made to the

---

Brumbaugh v. Wilson.

---

court. Thereafter, in January, 1902, an order of sale was issued by the clerk of the court, delivered to and commanding the sheriff to advertise and sell the land in question, without appraisement, "to satisfy one judgment for the sum of \$564, with interest from the first day of December, 1890, at 12 per cent per annum, and costs of suit, taxed at \$12.15, together with accruing costs, according to a judgment rendered by the district court of the twenty-third judicial district of the state of Kansas, sitting in and for Hodgeman county, on the 28th day of May, 1901, at the May term of said court, in a certain action then and there pending wherein Gaius M. Brumbaugh was plaintiff and Hiram L. Pratt, Mary E. Pratt, John P. Freese, S. T. Wilson and Mrs. Wilson, his wife, R. S. Mercer and Mrs. Mercer, his wife, James L. Hutchinson and Mrs. Hutchinson, his wife, and S. E. Forman were defendants, and that you return this order." Afterward the sheriff made due return of the order of sale, stating that the land had been sold for the sum of \$100 to Gaius M. Brumbaugh, he being the highest and best bidder for cash therefor. On March 2, 1902, upon the motion of the appellee, the sale was confirmed by the court. The order of confirmation recites:

"And the court having examined the proceedings of said sheriff, under said order of sale, finds that the same have been made in all respects in conformity with law, and, no exceptions being filed or objections made, it is ordered and adjudged by the court that said sale and proceedings be and the same are hereby approved and confirmed; and it is further ordered that A. E. Sweet, sheriff of said county of Hodgeman, make and execute to the purchaser thereof at said sale a good and sufficient deed for the premises so sold."

On March 10, 1908, the appellants, Wilson and Mercer, filed their motion in that action to set aside the order of sale, confirmation and deed to the land, for the reason "that the same was null and void in that the purported judgment ordering said order of

sale recited in said order of sale was neither rendered by this court, in that no judgment was ever rendered or entered by this court in said cause upon which said order of sale was issued or upon which it was founded, and for the further reason that the purported petition filed by said plaintiff herein did not and does not state a cause of action against said defendants or any of them." In support of this motion Wilson filed his affidavit that he was one of the defendants named, and that at all times since 1870 he had been a resident of the state of Kansas, residing and doing business during a portion of the time in Topeka, Shawnee county, and a portion of the time in Emporia, Lyon county, and was well known in that city; that he had no notice or knowledge whatever of the above-entitled action until August, 1907; and that at all times since January 1, 1890, he was a resident of, and could have been served with summons within, the state. On the hearing of the motion the clerk of the court was also sworn as a witness and testified that he had made investigation of the records in this case to ascertain whether or not there was a journal entry of judgment therein, and that there was no such entry. The appellee thereupon introduced the appearance docket of the court in the cause, which showed the following entry: "May 28, 1901. Journal entry filed; judgment for \$564, interest at 12 per cent; sale after six months." No further evidence was offered. The court, after hearing arguments, denied the motion, and Wilson and Mercer excepted and appealed to this court.

*J. G. Hutchison*, for the appellants.

*W. S. Kenyon*, for the appellee; *J. S. West*, of counsel.

The opinion of the court was delivered by

SMITH, J.: The appellants in this case do not in their motion ask that the judgment be opened up and that they be allowed to come in and defend, that jus-



---

Brumbaugh v. Wilson.

---

tice to all parties may be done. On the other hand they seek to avoid the proceedings under the judgment, and aver (1) that no judgment should have been rendered for the reason that there was no legal process served or notice given to confer jurisdiction on the court, as the affidavit for publication was not true; (2) that there should have been no judgment for the reason that the petition does not state a cause of action, but on the other hand shows that the action was barred by the statute of limitations at the time the petition was filed; and (3) while conceding that the appearance docket is a record of the court, required by law to be kept, and is evidence that a judgment was rendered and a journal entry thereof filed, they contend that such docket does not prove any judgment or decree ordering the sale of the land, but shows, if anything, a personal judgment which, at least, the court had no jurisdiction to render. We will consider these questions in their order.

(1) It is conceded that a proper affidavit was filed, a sufficient notice duly published, and the publication was approved, but it is said that the affidavit therefor was false. A sufficient answer is the following from the syllabus in *Davis v. Land Co.*, 76 Kan. 27:

"An affidavit filed as provided by section 73 of the code of civil procedure (Gen. Stat. 1901, § 4507), followed by the publication of a notice in accordance with section 74 of the code (Gen. Stat. 1901, § 4508), which are, on examination, approved by the court as required by section 75 of such code (Gen. Stat. 1901, § 4509), confers jurisdiction upon the court to hear and determine the action in which such service is made; and a judgment rendered therein is valid and unimpeachable, unless assailed for a cause and within the time prescribed by the statute, even though the affidavit was untrue and the defendant was ignorant of the pendency of the action and made no appearance therein."

Indeed, "a judgment based upon a willfully false affi-

davit for service by publication is not absolutely void." (*Duphorne v. Moore*, post.)

(2) The expiration of the time for bringing an action is a matter of defense. Only explicit allegations which show, not inferentially but directly, that the statutory time has run render a petition demurrable. Otherwise the question must be raised by a special plea. (*Parker v. Berry*, 12 Kan. 351; *Chellis v. Coble*, 37 Kan. 558.) The petition in this case does not affirmatively show that the cause of action was barred at the time of filing thereof. Even if the petition was demurrable, the judgment rendered thereon is not void nor can it successfully be collaterally attacked. In *Wyandotte County v. Investment Co.*, 80 Kan. 492, it was said:

"Where a court has jurisdiction of the subject matter of an action and of the parties, a petition which alleges sufficient facts to challenge the attention of the court as to its merits, and to authorize the court to deliberate and act, is sufficient to sustain a judgment rendered in the action upon evidence, as against a collateral attack on the ground that the judgment is void; and this although the petition may have been demurrable on the ground that it did not state facts sufficient to constitute a cause of action." (Syllabus.)

(See, also, *Chellis v. Coble*, supra; *Horner v. Ellis*, 75 Kan. 675; *Rowe v. Palmer*, 29 Kan. 337; *Davis v. Land Co.*, supra.)

(3) But, it is contended, even if the court had jurisdiction to render a judgment valid as against a collateral attack, there is no judgment of record in this case, nor is there evidence of any judgment having been rendered which would authorize the issuance of the order of sale, the sale and confirmation, or the sheriff's deed made in pursuance thereof. It would probably have been the better practice had the appellee, before entering upon the hearing of the appellants' motion, moved the court for a *nunc pro tunc* entry, if the evi-

---

Brumbaugh v. Wilson.

---

dence of the judge who rendered the judgment or the clerk who should have recorded the journal entry or the attorney who drew it could have been obtained. However, as against the unconscionable advantage which the appellants seek to gain through the omission of the clerk to record the journal entry, we think the court was right, under the evidence produced, in denying the motion. The appearance docket evidenced that a judgment had been rendered and a journal entry thereof had been prepared and filed; that the amount of the judgment was \$564, with interest at 12 per cent, and the sale was to be held after six months. How should the court have interpreted this record? The petition, after alleging facts, prayed for a personal judgment in favor of the appellee and against the appellants, for a foreclosure of the mortgage, and the sale of the land to satisfy the judgment prayed for. Personal service of summons had been attempted, but was not secured; then a service by publication was made and approved. The court could not reasonably infer that the judgment was personal, but could only say that it was a judicial determination of the sum due upon the note and mortgage—a judgment *in rem*. "Sale after six months" fairly meant a decree of foreclosure and for the sale of the land described in the mortgage after a six months' stay of execution, in accordance with the statute in force at the time the mortgage was given. Again, the order of sale, issued less than eight months after the judgment was rendered, recited the terms of the judgment and is some evidence thereof, although not of the highest class. A public officer is presumed, in the absence of evidence to the contrary, to have done his duty, and there is a presumption that the prepared journal entry had then been lost from the files. Where the proceedings of a court are attacked as void years after they occurred, and where the primary evidence of such proceedings is

---

Gibson v. Bransteel.

---

shown to be lost or destroyed, the court may consider such secondary evidence thereof as may be presented, and may entertain every presumption, consistent with such evidence, in support of the proceedings of the court.

The order denying the motion is affirmed.

---

CHARLES E. GIBSON, *Appellee*, v. GEORGE BRANSTOOL,  
*Appellant*.

No. 16,384.

SYLLABUS BY THE COURT.

1. **COUNTIES—Purchase at Tax Sale—Disposition of Land Not Redeemed in Three Years.** Where a county adopts the provisions of chapter 162 of the Laws of 1891 (Gen. Stat. 1901, §§ 7659-7661), and land is taken for the county thereunder and remains undeeded for three years or more, the county commissioners may dispose of it for less than the legal charges against it, or it may be conveyed to any person who offers to pay the legal charges due thereon without the intervention of the county commissioners.
2. **TAX DEEDS—Time of Execution after Assignment of Certificate.** Where such land is disposed of for a sum less than the legal charges due thereon, then, under the provisions of section 7672 of the General Statutes of 1901 (Laws 1893, ch. 110, § 4), six months must intervene between the date of the assignment of the certificate and the execution of the deed, but not otherwise.
3. **Consideration—Separate Statements of Selling Price and Subsequent Taxes.** Where a county held land taken under this law for more than three years the certificate was assigned to a purchaser for the full amount of legal charges against the land, and a tax deed was executed therefor on the same day. From the recitals in the tax deed it appeared that the amount of consideration received for the deed consisted of the amount of the original sale, with interest to the date of the deed, and the amount of the subsequent taxes, with interest to the same date, which amounts were separately stated, instead of being named as one lump sum, as contemplated by the statutory form of deed. *Held*, that this irregularity does not make the deed void.

---

Gibson v. Branstool.

---

Appeal from Decatur district court; WILLIAM H. PRATT, judge. Opinion filed March 12, 1910. Reversed.

*J. E. Peters*, and *Langmade & Caster*, for the appellant.

*Fred Robertson*, for the appellee.

The opinion of the court was delivered by

GRAVES, J.: This is an action of ejectment, commenced by Charles E. Gibson in the district court of Decatur county to recover the possession of the land in controversy. The defendant, George W. Branstool, was in the actual possession of the land, and had been in possession thereof for more than three years prior to the commencement of this action. The rent for these three years is worth the sum of \$50. The defendant has paid as taxes on the land the sum of \$281.42. The plaintiff holds the patent title and claims ownership thereunder. The defendant claims under a tax deed which was executed September 2, 1899. It was therefore recorded more than five years before the action was commenced.

The only question involved is the validity of the tax deed. The case was tried to the court without a jury. Special findings of fact and conclusions of law were filed by the court. The tax deed reads:

"KNOW ALL MEN BY THESE PRESENTS: That whereas the following-described real property, viz., southeast one-fourth of section twenty-one (21), township four (4) south, range twenty-eight (28) west of the 6th P. M. in Kansas, situated in the county of Decatur and state of Kansas, was subject to taxation for the year A. D. 1893; and whereas the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and whereas the treasurer of said county did on the 4th day of September, A. D. 1894, by virtue of the authority in him vested by law, at Oberlin, Kan., the sale begun and publicly held on the first Tuesday of

September, A. D. 1894, expose to public sale, at the county seat of said county, in substantial conformity with all the requisitions of the statutes in such cases made and provided, sell the real property above described for the payment of the taxes, interest and costs then due and remaining unpaid upon said property; and whereas, at the place aforesaid, said property was bid off by the county treasurer for said county for the sum of six dollars and 27 cents, the whole amount of taxes and charges then due; and whereas, for the sum of ten dollars and 92 cents, paid to the treasurer of said county on the 2d day of September, A. D. 1899, the county clerk did assign the certificate of sale of said property, and all the interest of said county in said property, to said Dan Caster, of the county of Decatur and state of Kansas; and whereas the subsequent taxes for the years 1894, 1895, 1896, 1897, amounting to the sum of \$35.78, have been paid by the purchaser, as provided by law; and whereas three years have elapsed since the date of said sale and the said property has not been redeemed therefrom as provided by law; now, therefore, I, W. H. Andrews, county clerk of the county aforesaid, for and in consideration of the sum of forty-seven dollars and five cents, taxes, costs and interest due on said land for the years 1893, 1894, 1895, 1896, 1897, to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said Dan Caster, his heirs and assigns, the real property last hereinbefore described. To have and to hold, unto him, the said Dan Caster, his heirs and assigns, forever; subject, however, to all rights of redemption provided by law."

In 1892 the board of county commissioners of Decatur county adopted and put into force chapter 162 of the Laws of 1891, being sections 7659 to 7661, inclusive, of the General Statutes of 1901.

Section 7661 of the General Statutes of 1901 (Laws 1891, ch. 162, § 3) reads:

"In all counties adopting the provisions of this act the county treasurer shall not accept from any person or persons except the owner, his heirs, executors, administrators, assigns, or any mortgagee of real estate sold for taxes or his assigns, the sum of money equal to

---

Gibson v. Branstool.

---

the cost of redemption at that time, for any tract of land or town lot sold for taxes, and shall not give any person except the owner, his heirs, executors, administrators, assigns, or any mortgagee of real estate sold for taxes, or his assigns, a certificate showing that said lands had been redeemed; but all the lands so bid off by the county for taxes shall be held by the county until the expiration of three years from the date of sale, subject only to the right of the owner, his heirs, administrators, assigns, and mortgagee of real estate sold for taxes, or his assigns, to redeem the same; and if at the end of three years from the date of sale said lands shall not have been redeemed, the board of county commissioners of said county shall then dispose of said lands under the general provisions of the law now in force."

This law has ever since been in force in that county, and the tax deed in question was issued thereunder. The court held the deed void for the following reasons:

"(1) For the reason that said deed does not, upon its face, or elsewhere, show any authority from the board of county commissioners of Decatur county, Kansas, authorizing the county treasurer or county clerk of said county to assign said tax-sale certificate. (2) For the reason that the said deed fails to show upon its face, or elsewhere, any authority from the board of county commissioners of said county authorizing or empowering the county clerk of the said county to make, execute or deliver said tax deed. (3) For the reason that the assignment of said tax-sale certificate by the said county treasurer and county clerk to the said Dan Caster [was?] for a sum greatly less than the amount then required to redeem said lands from sale and the taxes then against said land. . . . (5) For the reason that said tax deed was so executed and delivered on the same day that the said tax-sale certificate was so assigned."

As to the first reason, the law does not require the county commissioners to make any order unless it be for the sale of lands for less than the legal tax and interest thereon and hence has no application to this case. The same may be said of the second reason. As to the third reason, the legal amount due under the re-

---

Gibson v. Branstetl.

---

citals in this deed will vary somewhat, depending upon the rule followed in the computation. The discrepancy complained of in this case amounts to five cents. Under the case of *Troyer v. Beedy*, 79 Kan. 502, this amount is too trifling to make a deed void. As to the fifth reason, the law requiring delay between the assignment of the certificate and the execution of the deed does not apply except in cases where the land is sold for less than the full amount necessary to redeem. (Laws 1893, ch. 110, § 4; Gen. Stat. 1901, § 7672.) Under this section it is unnecessary for the county commissioners to act in the disposition of land except when it is to be sold for less than the amount necessary for its redemption. In such a case, however, land can only be disposed of under the direction of the county commissioners, and the tax deed must show that the conveyance was made in pursuance of such direction; but after a county has held lands for three years or more, and the persons interested therein have not redeemed it, then it may be conveyed to any person offering to pay the taxes, costs, and penalties due thereon, without the intervention of the county commissioners. In this view, the fifth reason given by the court does not apply to the facts in this case, as the land was sold for a sum substantially sufficient for its redemption.

The claim that the deed should be held void because the subsequent taxes are not mentioned as a part of the consideration of the assignment of the certificate can not be upheld. The recitals of the deed show that the assignment of the certificate was made September 2, 1899, and that the subsequent taxes for the years 1894, 1895, 1896, 1897 "have been paid by the purchaser as provided by law." The deed was executed on the same day. It follows that the assignment of the certificate, the execution of the deed, and the payment of the consideration constituted practically one and the same transaction. The mere form of recital in the deed in this respect is unimportant.



---

Hospital Co. v. Philippi.

---

The objections made to the deed are not substantial. It is in substantial compliance with the law and should be sustained. We concur with the district court in the other findings of fact and conclusions of law, but its conclusions as to the tax deed were erroneous, and for that reason the judgment is reversed.

---

THE BETHANY HOSPITAL COMPANY, *Appellee*, v. NELLE K. HUBBARD PHILIPPI, *Appellant*.

No. 16,386.

SYLLABUS BY THE COURT.

1. **JURY TRIAL**—*Action by Devisee to Cancel Deed—Insane Grantor—Fraud.* An action by a devisee under a will conceded to be valid to cancel and set aside a deed which the maker of the will was fraudulently procured to execute when he was of unsound mind is equitable in character, and therefore neither party is entitled to a jury trial of the same as a matter of right.
2. **EQUITABLE PROCEEDING**—*Special Findings by a Jury—Independent Consideration of Testimony by Trial Court.* The trial court, having called a jury to answer special questions of fact, was at liberty either to adopt the answers returned by the jury or to ignore them and make findings of its own, based upon an independent consideration of the testimony.
3. **ACCRUAL OF ACTION**—*Amended and Supplemental Petition Filed after Action Accrued.* Where the devisee of the will brought the action before the will was probated, and later, when it was probated, filed an amended and supplemental petition, on which the cause of action was tried, the objection that the action was prematurely brought became immaterial.
4. **DEEDS**—*Insane Persons—Notice—Consideration—Cancellation—Disaffirmance—Parties.* A deed executed by an insane person to one who has knowledge of the mental incapacity of the grantor and who gives no substantial consideration for the property is an absolute nullity. It does not operate to revoke a valid will previously made by the grantor, and a devisee under the will has sufficient interest to justify him in maintaining an action against the grantee to declare the deed to be

---

Hospital Co. v. Philippi.

---

void, although there has been no prior disaffirmance of the deed or a tender back of the nominal consideration paid by the grantee.

5. **PLEADINGS**—*Joinder of Causes of Action*. A petition alleging that the deed was void because of the mental weakness of the grantor and the undue influence exercised upon him while in that condition, and asking to have the deed adjudged to be void, states only a single cause of action.
6. **INSANE PERSONS**—*Finding Supported by Evidence*. The testimony examined and held to be sufficient to uphold the finding of the trial court that the grantor was without mental capacity to execute the deed in question.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed March 12, 1910. Affirmed.

*W. Littlefield, F. M. Harris, W. J. Costigan, W. H. Clark, and Campbell & Goshorn*, for the appellant.

*Nelson Case, Wilbur S. Jenks, and L. W. Keplinger*, for the appellee; *Ewing, Gard & Gard*, of counsel.

The opinion of the court was delivered by

JOHNSTON, C. J.: This action was brought by the Bethany Hospital Company, to which certain property was devised by the will of Samuel B. Rohrbaugh, to declare a deed to be void and to enjoin the conveyance or encumbrance of the property by the defendant, Nelle K. Hubbard Philippi, who claimed the property under a deed alleged to be absolutely void and to have been fraudulently obtained. It appears that in March, 1903, Samuel B. Rohrbaugh executed a will which, among other devises, gave the hospital company property in the city of Ottawa known as the "Boston store building," worth about \$25,000, and it is conceded that the testator was of sound and disposing mind when the will was made. On February 22, 1907, about two months before Rohrbaugh died, he signed a deed which purported to convey the property in question to Nelle K. Hubbard Philippi. This conveyance is attacked by the hospital company on the ground that Rohrbaugh

---

Hospital Co. v. Philippi.

---

was of unsound mind at the time it was made, and, further, that defendant and others interested took advantage of the grantor's enfeebled mental condition and by undue influence obtained the execution of the deed. It appears that Rohrbaugh had been successfully engaged in the lumber business in Ottawa for about forty years and until his death, in 1907. During that time he had acquired property worth about \$150,000. In the last years of his life the active charge and detailed work of the business, including the payment of bills, the collection of accounts and the signing of checks and contracts, was attended to by Charles H. Constant, who had a partnership interest in the lumber business. Since 1905, however, Samuel R. Hubbard, a nephew of Rohrbaugh and a brother of defendant, who also had an interest, assisted to some extent in the management of the business. In 1882 Rohrbaugh's wife died, when their son was four years old, and the boy made his home with Mrs. Hubbard, a sister of Mrs. Rohrbaugh, until his death about sixteen years later. Rohrbaugh boarded with the Hubbard family most of the time after the death of his wife, and it appears that he was greatly attached to Nelle K. Hubbard, generously contributing toward her education, and was greatly pleased with her progress. In the will mentioned Rohrbaugh gave defendant and the several members of the Hubbard family a number of pieces of real property, which together were worth approximately \$55,000, and also considerable personal property. It appeared, too, that he was a member of the Methodist church, to which he had given liberally of his means, and he had made provisions for it and other Methodist institutions in his will.

There is evidence tending to show that early in 1906 Rohrbaugh, then being about seventy-six years of age, and affected with rheumatism and other ailments, became weak of body and feeble of mind, and that his mental degeneration gradually increased until his

death. On February 20, 1907, a proceeding to inquire into his mental condition and for the appointment of a guardian to take care of him and his estate was begun on the application of some of his neighbors who were members of his church. According to much of the testimony he did not comprehend the nature of the proceeding and seemed to understand that he was under arrest, and was therefore very much angered at those who instituted it and greatly agitated because of it. A hearing of the application was had on February 26, 1907, but the jury failed to agree. While the proceeding was pending, and while Rohrbaugh was surrounded by the Hubbards and witnesses chosen by them and their attorney, he signed deeds prepared for him which on their faces conveyed to defendant and other members of the Hubbard family nearly his entire estate, for a nominal consideration and his love and affection for the grantees. Shortly after the execution of the deeds and the hearing mentioned Mrs. Hubbard took him to Excelsior Springs, and there he rapidly grew weaker, and died on April 15, 1907.

Before the will had been offered for probate, and on April 24, 1907, this action was begun. The will was probated on April 29, 1907, and on May 3, 1907, an amended and supplemental petition was filed setting forth a copy of the will and the probate of the same, and under it the case was tried. The defendant answered setting up her deed from Rohrbaugh, and asking that her title be quieted as against the plaintiff and that it be barred from claiming any interest or estate in the property. The defendant demanded a jury trial as a matter of right, which was denied. Some special questions, however, were submitted to a jury to aid the court; but that jury failed to agree and another was called, to which issues of fact were referred, but the answers returned, which in the main were favorable to defendant, were not adopted by the court. Upon in-

dependent consideration of the evidence the court made findings of its own.

Although demanded by the appellant she was not entitled to a jury trial. The action was equitable in its nature, brought to declare a deed void and to remove a cloud upon the title which it is claimed passed to appellee under the provisions of the will. In connection with this relief, an injunction against transferring or encumbering the property by the grantee in the deed was asked. The appellant in her answer recognized the equitable character of the proceeding and asked to have her title quieted as against the claim of appellee. In such a case a jury may be called to answer special questions submitted to it, but the answers of the jury are not binding on the court. It may ignore them and upon independent considerations make findings of its own, as the trial court did in this instance. (*Medill v. Snyder*, 61 Kan. 15.)

There is a contention, however, that appellee did not have such an interest in the property as warranted it in maintaining an action against appellant. It is first argued that the will was not probated when the original petition was filed, but this is accounted for in the averments of the pleading. The question is not a practical one, as the amended and supplemental petition was filed after the will had been probated; and, besides, the due execution of the will was not in controversy. The probating of the will furnishes evidence of an effective gift and the transfer of title, and the will when probated takes effect by relation from the time of the testator's death. It is earnestly argued that the deed, being valid on its face and at most only voidable, operated to revoke the will; that if a fraud was committed on Rohrbaugh he was the only party who could complain, and that one subsequently acquiring an interest in the property can not set up the fraud of appellant in obtaining the conveyance. Rohrbaugh, it is said, was at liberty to forgive the wrong, and in any event his right to contest the

validity of the deed was incapable of transfer to anyone. It is further contended that there was no disaffirmance by Rohrbaugh, or anyone in his behalf, although there was ample time for such action between the execution of the deed and his death, and that disaffirmance must precede the bringing of an action.

It is true that while the testator lives a gift or devise is only a possibility, and, further, that a will only speaks from the time of the testator's death. It is also true that one who attacks a deed or other instrument of revocation must have a vested interest in the property. On the theory of appellee it had an interest when the action was brought. It contended and the trial court found that the deed was an absolute nullity. If Rohrbaugh had no capacity to execute a deed, no property was conveyed. If the instrument signed was an utter nullity, Rohrbaugh was the owner of the property at the time of his death. If the title of the property was in Rohrbaugh when he died, it became subject to the provisions of the will and passed to the appellee. The theory of the appellee was, not that the deed was merely voidable, but that it was utterly void, and hence the rules suggested by appellant are not applicable. If the deed did not transfer the title from Rohrbaugh, then appellee acquired the complete title to the property upon the death of Rohrbaugh, and also the right to bring an action to have the deed declared void. This question was raised and directly decided in *Waller v. Julius*, 68 Kan. 314. That was an action to cancel a deed made without consideration by one of unsound mind. Waller claimed title under an agreement with the grantor and her husband to the effect that if she cared for them during their lives the property would become hers. After the death of her husband the grantor conveyed the property to Julius. Waller brought the action, and it was argued that she had no interest and no standing to challenge the deed for fraud

or want of consideration. The court met this claim by saying:

"The action is not an attack upon a deed voidable for fraud and want of consideration, but an effort to clear the record of an apparent deed that is in fact no deed at all, because made by an insane grantor to a grantee who knew of her incapacity and who gave nothing for it. True, it is said that as a general rule a deed made by a person of unsound mind who has not been judicially declared insane is not wholly void. But this rule grows out of practical considerations and is for the benefit of innocent grantees for value. One who takes a deed, paying nothing for it, and knowing the grantor to be insane, is not within its reason and is not protected by it. The caution with which this court has held that the deed of an insane person can ever be treated otherwise than as absolutely void confirms this." (Page 316.)

The case of *Gribben, Guardian, v. Maxwell*, 34 Kan. 8, cited by appellant, belongs in an exceptional class of cases and lays down the rule that one who in good faith purchases property from an insane person before there is an inquisition, without knowledge of the insanity, for a fair and reasonable consideration, no advantage being taken by the purchaser, does not lose everything, and the guardian of the insane person is not permitted to recover the land without returning the consideration. This rule is applied for the protection of an innocent party, and to prevent a representative of the insane person from obtaining and keeping the property as well as the consideration honestly paid. Even in that case the court took pains to state the general rule to be that "the contract of a lunatic is void *per se*. The concurring assent of two minds is wanting. 'They who have no mind can not "concur in mind" with one another; and, as this is the essence of a contract, they can not enter into a contract.' *Powell v. Powell*, 18 Kan. 371." (Page 9.) The case of *Leavitt, Guardian, v. Files*, 38 Kan. 26, belongs in the same class, and applies the rule that if a contract is entered into in good faith and no

advantage is taken of the person of unsound mind it would be inequitable to allow him to recover the property and retain the price paid by the purchaser.

Strictly speaking, a party dealing with a person *non compos mentis* does not recover on the contract itself, but, having dealt fairly with the person of unsound mind and in ignorance of his incapacity, he is deemed to be entitled to that with which he has honestly parted and is not required to surrender both the property and its price. The present case, however, does not come within any of these exceptions to the general rule. According to the averments and much of the evidence no substantial consideration was paid. The conveyance was not obtained in good faith by the grantee. She had knowledge of the incapacity of the grantor. She did take advantage of his mental weakness and by undue influences procured the execution of the deed. If these facts are established, the deed is absolutely void. Even if there had been good faith there was no consideration to return, because, as we have seen, only a nominal consideration was paid. If the deed had no existence or force, it had no effect on the will, which is admitted to be valid; and so it has been said that "if the deed . . . is void" or inoperative as a deed "it should not be allowed an incidental operation by way of revocation." (*Graham v. Burch*, 47 Minn. 171, 175.) A formal disaffirmance was not a prerequisite step to the bringing of the action to get rid of the void conveyance. Disaffirmance by one without mental capacity would have been unavailing, and so far as appellee is concerned it appears to have taken prompt action after the death of the testator and the passing of the property to it.

Error is assigned on the refusal of the court to require appellee to elect upon which cause of action it would rely. The appellant's theory appears to be that the petition sets out two causes of action; the first, that the grantor of the deed was without mental capacity, and the second, that the execution of the deed was



---

Hospital Co. v. Philippi.

---

procured by undue influence; and, further, that these are inconsistent claims. There was in fact but one cause of action—one main object sought, and that was the getting rid of the void deed. Only one deed was involved, and it was alleged to be void because of the mental weakness of the grantor and the undue influence exercised upon him in his weak condition. These grounds may coëxist and are not inconsistent in the sense that will prevent proof showing both. Each is a reason for adjudging the deed to be a nullity, and together they give but one right of relief and constitute but one cause of action. (*Bank v. Woodrum*, 60 Kan. 34; *Howard v. Carter*, 71 Kan. 85; *Lattin v. McCarthy*, 41 N. Y. 107; Maxwell, Code Plead., p. 96.)

Two objections to rulings on testimony are briefly presented, but neither of them is deemed to be material. It is said that Judge Smart, the executor of the will, was permitted to relate conversations with Rohrbaugh which occurred when the relation of attorney and client existed between them. We find no basis in the evidence for holding that such relation then existed. The other objection is the exclusion of the testimony of a physician, called to treat Rohrbaugh at Excelsior Springs, relating to his condition at that time. The doctor was asked and not allowed to give his opinion as to Rohrbaugh's sanity, based on information outside of what he had obtained in a professional way. It would have been very difficult to have found a line between the professional and nonprofessional information of this witness, and it is very doubtful if any of the proposed testimony would have been competent. Each party produced a great volume of testimony relating to the mental condition of Rohrbaugh, and even if any of the testimony of the doctor was other than confidential or could have been brought within the region of competency its exclusion can hardly be regarded as material error.

The remaining question as to the mental condition of Rohrbaugh when the deed was executed has been determined upon the testimony of those who were near to and associated with him in the last year of his life, as well as upon the evidence given by experts who testified as to the mental disease with which he was afflicted. While there was a sharp conflict in the testimony on this question there was a great deal of evidence of a convincing character tending to show incapacity. The findings of the trial court indicate the nature of his malady and the stage to which it had progressed when the deed was signed. Among other things the court found:

"(11) That the mental malady with which said Samuel B. Rohrbaugh was afflicted seemed progressive in character and grew worse, showing a gradual but sure impairment of the mental faculties, more especially those of memory, will power, concentration of thought and judgment, such features and symptoms being manifested as early as February, 1906, and gradually growing worse until the same culminated in his death. He spent much of his time during the last months of his life sitting in his lumberyard office; he would sit in a posture inclined forward, have a vacant expression on his face, and seemingly totally oblivious to surroundings; he would awake from such stupors and would make attempts to transact business, but would immediately forget prices and quantities and qualities. This condition of mind, by September, 1906, manifested itself in his becoming unable to dress himself unaided. He became subject to delusions, at times imagining that burglars had been in his room at nights, and having conflicts with them; at times imagining seeing men and teams and other objects where none such existed. On different occasions he became lost, and had to be assisted and guarded in going to and from his meals, only a short distance and along a route long and familiarly known to him for years before; on different occasions he wandered into the house or onto the premises of neighbors adjoining his boarding place. On one occasion during the month of November, 1906, he imagined he had been robbed or there were burglars in his room, and opened his windows at night, making

an outcry. Soon after these demonstrations on the part of Samuel B. Rohrbaugh, Mrs. Ida Hubbard and her family took him, the said Samuel B. Rohrbaugh, to their home, where he continued to room until about February 1, 1907, when Mrs. Hubbard and her daughter, Nelle K. Hubbard, defendant, with Samuel B. Rohrbaugh, moved into the new residence above mentioned. So far as the evidence discloses the husband of Mrs. Hubbard was home very little during the last year of Mr. Rohrbaugh's life. During the month of December, 1906, the acts and conduct, as before mentioned, of the said Samuel B. Rohrbaugh became so pronounced that the Hubbard family procured a man to come to their home at night to guard Samuel B. Rohrbaugh and care for him at night, and this person remained to wait upon the said Samuel B. Rohrbaugh by night for about two months, or until about the 20th of February, 1907; and during said period, to wit, during the two months preceding the 20th of February, 1907, said Samuel B. Rohrbaugh in his enfeebled and diseased condition of mind imagined he saw . . . imps and devils in his room; he became careless in the use of his tobacco, although formerly he had been clean, and was unable to wait upon himself in the toilet room without direction, mistaking the bath tub for a urinal. However, the evidence fails to disclose that he was violent, but was easily persuaded and tractable with those with whom he was acquainted. For two or three months prior to the date of the execution of the deed in controversy in this action the mental condition of the said Samuel B. Rohrbaugh became such that on different occasions he was unable to recognize property belonging to himself upon which he had erected costly improvements, denying that it belonged to him; on one occasion, pointing out his own lumberyard as that of a rival in business; and though having been familiar with the fact of the death of an associate and friend of years gone by he made inquiries concerning the health of the deceased; having received payment of a claim in litigation, he made inquiry of the attorney on the next day after such payment as to the progress of the case; seemed to lose power of location of places familiar to him; mistaking the day of the week and the hour of the day; though Samuel B. Rohrbaugh had large experience in building, and was thoroughly conversant with the prices of lumber and the cost of building, yet

## Hospital Co. v. Philippi.

at the time the building referred to in finding number 10 was just about completed he had no knowledge as to the cost of the building, and supposed it to be only about \$5000, although, as before stated, it cost about \$17,000, and, also, while he had personal knowledge that stone was contracted for to the amount of \$1000 for certain portions of the work in part of the house, and after a considerable part of the stones had been actually used in the building and the greater part of the remainder was on the ground, he was entirely ignorant or forgetful of the fact and insisted on getting wood for the same purpose."

In other findings the court stated :

"(22) That upon the day on which the deed in controversy, as well as the other deeds, were executed, to wit, February 22, 1907, Samuel B. Rohrbaugh was suffering from such physical and mental weakness as to be unable to dress himself properly without assistance, and it would have been unsafe and unwise to permit him to go to the closet or out upon the streets without an attendant; that his memory and mental powers were so impaired and weakened as to incapacitate him from remembering his prior wills or the provisions thereof; that he was mentally incapable of concentrating his attention upon such matters, or his relations to the interests provided for in said will or his relations thereto, or acting with intelligence with regard to the matters therein contained; that he, the said Samuel B. Rohrbaugh, was not on said day of sound mind and memory.

"(17) That on the day succeeding that of the execution of the deed to defendant the said Samuel B. Rohrbaugh, leaving the house unattended, became lost on the streets of Ottawa, Kan., and was brought back by parties who, together with the Hubbard family, were in search of him, and on the third or fourth day after the execution of the deeds the said Rohrbaugh pointed out an imaginary one-legged chicken which he thought he saw running in the parlor in which he was seated, and also referred to an imaginary packing house in the city of Ottawa, Kan., where he then was, and stated that he used to work there thirty-five years ago, although in fact there was no packing house there and the only time and place he ever worked in any packing house was in Springfield, Ill., forty years ago."

---

Van Buskirk v. Lawrence.

---

While the credibility of the witnesses and the probative force of their testimony were questions for the trial court, and while its findings based on competent testimony are binding on this court, a reading of the testimony as written in the record satisfies us that it not only supports but that it abundantly sustains the finding of incapacity. That being established, the deed in question is a nullity, regardless of whether undue influence was exercised upon the grantor by anyone; and hence the judgment of the district court must be affirmed.

BENSON, J., not sitting.

---

82	76
d82	552

WILLIAM T. VAN BUSKIRK, *Appellant*, v. ARTHUR LAWRENCE *et al.*, *Appellees*.

No. 16,887.

SYLLABUS BY THE COURT.

**TAX DEEDS—Selling Price Omitted—Misstatement of Cost of Redemption—Presumptions.** A tax deed based upon a sale to the county and an assignment of the certificate, which does not in terms state the sale price and which misstates the cost of redemption, which was the consideration for the assignment, is not void on its face if, from data furnished by the deed and the law, aided by the presumptions which may legitimately be indulged, the sale price may be ascertained and the recital corrected.

Appeal from Morton district court; WILLIAM H. THOMPSON, judge. Opinion filed March 12, 1910. Affirmed.

Stephen H. Allen, Otis S. Allen, and George S. Allen, for the appellant.

G. Porter Craddock, William Easton Hutchison, and C. E. Vance, for the appellees.

The opinion of the court was delivered by

BURCH, J.: In this case a tax deed, of record more than five years, recites a sale to the county on September 4, 1894, for the taxes of 1893, an assignment of the certificate on March 28, 1898, for \$8, the cost of redemption at that time, the payment of subsequent taxes for the year 1894, amounting to \$9.15, for the year 1895, amounting to \$8, and for the year 1896, amounting to \$5.75, an aggregate of \$30.86, and a conveyance on March 28, 1898, for a paid consideration of \$41.84, the taxes, costs and interest for the years 1893, 1894, 1895 and 1896. It is said the tax deed is void on its face because the sale price is not stated and the certificate was assigned for a sum less than the cost of redemption. If from data furnished by the law and the deed, and the presumptions which may legitimately be indulged, it is possible to meet these criticisms, the deed is not void on its face. There is no difficulty in doing this by making an analysis of the consideration stated in the deed.

The cost of making the deed was fifty cents, the fee for the certificate was ten cents, and the fee for the redemption notice is fixed by law at twenty-five cents as a maximum. Assume, as it is proper to do (*Glenn v. Stewart*, 78 Kan. 608), that the fee in fact paid was twenty cents. The sum of these charges is eighty cents, which, deducted from the consideration, leaves \$41.04. The land having been sold to the county, it was not resold for subsequent delinquent taxes, but such taxes were charged up on the days when sales otherwise would have occurred. Computing interest on the amounts stated as the taxes for 1894, 1895 and 1896 from the 4th day of September of the proper years, the total for subsequent taxes and interest is \$28.75. The day of sale would not be the 4th day of September of each year, but that is an average date, and the differ-

---

Elliott v. Bellevue.

---

ence in interest on the small sums involved would probably not amount to a penny either way. Deducting \$28.75 from \$41.04, the remainder is \$12.29. This sum necessarily is the sale price and interest, and it is just one cent more than \$8 with interest from the day of sale to the day the certificate was assigned. The variance may be accounted for by the assumption of the average date referred to or by difference in method of calculation. The sum of \$30.86 inserted in the deed is plainly the sale price plus the subsequent taxes without interest, and may be ignored. The result is that the sale price is mathematically demonstrated from the face of the deed. The amount necessary to redeem is shown by the same unerring process, and that amount was paid by the purchaser for the certificate. It is true the deed contains a misrecital; \$8 is the sale price and not the sum necessary to redeem; but since the deed itself corrects the recital it is valid on its face.

Whether a different result would have been reached in the case of *Finn v. Jones*, 80 Kan. 431, had the method here employed been duly pressed upon the attention of the court need not be determined.

The judgment of the district court is affirmed.

---

E. M. ELLIOTT *et al.*, *Appellees*, v. THE BELLEVUE GAS AND OIL COMPANY, *Appellant*.

No. 16,388.

SYLLABUS BY THE COURT.

**APPEAL BOND—Sureties—Signature.** Persons who have signed an affidavit indorsed on an appeal bond, describing themselves as sureties thereon, must be deemed, in the absence of some showing to the contrary, to have intended thereby to bind themselves in that capacity, and therefore to have executed the bond, although their signatures are not otherwise attached to it.

**Appeal from Chautauqua district court; GRANVILLE P. AIKMAN, judge. Opinion filed March 12, 1910. Reversed.**

*Joseph P. Rossiter, for the appellant.*

*S. H. Jones, for the appellees.*

The opinion of the court was delivered by

MASON, J.: E. M. and M. L. Elliott obtained a judgment before a justice of the peace against the Bellevue Gas and Oil Company. In order to appeal therefrom the company filed with the justice an instrument in the usual form of an undertaking for that purpose, signed by itself. Two lines under its signature, manifestly intended to indicate the place where the sureties were to sign, were left blank. Indorsed upon the paper, however, was an affidavit signed by C. R. Walterhouse and J. N. Carr, and sworn to by them before the justice, reading as follows:

"We, the undersigned, sureties on the within undertaking, do solemnly swear that we are residents of said county and state, and that we are each worth \$1200 over and above all exemptions, debts and liabilities."

The justice approved the bond and transmitted the case to the district court. There the plaintiffs moved to dismiss the appeal on the ground that the bond was insufficient to confer jurisdiction, because it was not signed by any surety. Pending the decision of the motion the defendant asked leave to amend by having Walterhouse and Carr sign their names in the blank spaces referred to. Leave to amend was denied and the motion to dismiss was sustained. The defendant appeals.

Under the statute (Jus. Civ. Code, § 121) one wishing to appeal from the judgment of a justice of the peace must within ten days enter into an undertaking for the purpose with at least one surety. Yet an appeal bond signed only by the parties bound by the judg-



ment is held not to be a nullity, but to be capable of amendment by the addition of new signatures after the expiration of the ten days. (*McClelland Bros. v. Allison*, 34 Kan. 155; *Ottawa v. Johnson*, 73 Kan. 165.) Here, however, the bond does not in fact lack the signatures of the sureties. At least in the absence of a statute requiring a signature to be "subscribed" to an instrument, it is immaterial to what part of it signers attach their autographs, so long as by such act they signify their consent to be bound by its terms.

"While the proper place for the signature of the obligors is at the foot of the agreement, yet independent of any statutory requirement the manner and form of the signature is immaterial, provided it is made by the surety for the purpose and with the intention of binding himself." (5 Cyc. 735.)

"The manner or form in which an obligor signs is immaterial, provided that he signs for the purpose of binding himself." (4 A. & E. Encycl. of L. 621.)

Walterhouse and Carr did not write their names immediately under that of the judgment defendant, but in another place on the same paper they signed a statement describing themselves as sureties on the bond. In attaching their signatures to this writing they must be deemed to have intended the execution of the bond, since they thereby acknowledged themselves to be bound by its terms. No other rational interpretation can be placed upon their act. For the sake of greater formality the sureties might properly have been permitted to affix their signatures in the space left for that purpose, but in its present form the bond is sufficient to perfect the appeal and to confer jurisdiction on the district court.

The judgment is reversed and the cause remanded, with directions to permit the bond to be amended, and upon its amendment to deny the motion to dismiss the appeal.

**M. B. PATTON *et al.*, Appellants, v. THE HAMILTON  
COAL AND MERCANTILE COMPANY, Appellee.**

No. 16,892.

SYLLABUS BY THE COURT.

**LANDLORD AND TENANT—*Advancements by Tenant—Action by Lessor for Royalties.*** Where a lessee, at the time of making the lease, deposits money with the lessor as an advance payment of certain sums to become due by the terms of the lease from time to time, the lessor has no cause of action against the lessee to recover any such sums of money which have become due while a sufficient amount of the deposit remains in his hands to discharge the same.

Appeal from Crawford district court; ARTHUR FULLER, judge. Opinion filed March 12, 1910. Affirmed.

STATEMENT.

THE appellants brought action in the district court of Crawford county and in their petition alleged that on January 6, 1908, they were the owners of certain described land; that on that day they entered into a written contract with the appellee by the terms of which, in consideration of certain royalties to be paid, they granted to the appellee the right to mine the coal from the land; that \$15,000 advance royalty was paid by the appellee to them as provided by the contract January 28, 1908; that by the terms of the contract and before the commencement of the action the appellee should have paid them \$240 on or before September 25, 1908, \$240 on or before October 25, 1908, and \$240 on or before November 25, 1908; and that the appellee wholly neglected and refused to pay any portion of such sums. Judgment in the sum of \$720 and all proper relief was prayed for.

By the terms of the contract the lessee was to pay the lessors eight cents per ton for all coal mined, to conduct the mining in good and workmanlike manner, industriously and actively, and to continue mining until

---

Patton v. Hamilton.

---

all the coal under the land, of a marketable quality, which could be taken out profitably should be mined. The lease is long and provides the manner of weighing, reporting weights and other details. The portions of the lease under which the controversy arose are in the following:

(1) "It is further agreed that the said party of the second part shall pay or cause to be paid as a minimum royalty to the said parties of the first part the sum of two hundred forty (\$240) dollars per month, or at the rate of eight (8) cents per ton on three thousand (3000) tons of coal, whether this amount of coal shall have been mined during any one month or not, but it is also agreed that if by reason of strikes or accidents or by any other cause the said party of the second part shall fail to mine three thousand (3000) tons of coal during any one month during the continuance of this grant and shall have paid to the parties of the first part the sum of two hundred forty (\$240) dollars, or such part thereof as may be possible *pro rata*, shall be credited upon the amount of royalty due for any subsequent month which royalty for [such] subsequent month is in excess of the sum of two hundred forty dollars, or which amount of coal so mined is in excess of three thousand tons.

(2) "It is further agreed that the said party of the second part shall pay to the said parties of the first part the sum of fifteen thousand (\$15,000) dollars, which is an advance upon royalty hereafter to become due to the said parties of the first part from the said second party from the mining of coal from the said land, as aforesaid.

(3) "It is agreed that the minimum royalty hereinbefore referred to shall commence upon the first day of August, 1908, but it is also understood that this agreement shall not be deemed a waiver to royalty on any coal which may be mined prior to that date."

To this petition the appellee filed a general demurrer, which the court sustained, and exception thereto was made. The appellants declining further to plead, judgment was rendered against them for costs.

**O. T. Boaz, for the appellants.**

**Glasse & Burton, for the appellee.**

The opinion of the court was delivered by

SMITH, J.: The questions presented depend entirely upon the construction to be given to the contract. The appellants contend that the paragraphs of the contract copied above are determinative of the controversy; that by the terms of the second paragraph the \$15,000, admitted to have been paid, is an advance payment of royalty for coal actually mined, while the first paragraph requires the payment of \$240 per month after and including August, 1908, whether any coal is mined or not. In other words, it seems to be conceded that if 3000 tons or more of coal were mined each month the royalty therefor might properly be deducted from the \$15,000 advanced, but if no coal, or less than 3000 tons, be mined in a certain month the \$240 or the royalty on the coal not mined necessary to make up 3000 tons could not be so paid.

We can not accept this construction of the contract. The second paragraph provides, in relation to the application of the \$15,000: "Which is an advance upon royalty hereafter to become due to the said parties of the first part from the said second party from the mining of coal from the said land, as aforesaid"—not from "coal mined" but from "mining coal." The entire contract relates to mining coal, and the minimum royalty due after August, 1908, is \$240 per month.

The \$15,000 is not subject to forfeiture, but is a deposit as security for the payment of any royalties which may become due by the terms of the contract, whether by reason of mining less or more than 3000 tons per month. (*Cummingham v. Stockton*, 81 Kan. 780.)

Under the contract the plaintiffs had the right to pay themselves \$240 as royalty out of the deposit on the 25th of September, October and November. They have

---

Bowland v. McDonald.

---

no cause of action against the appellee so long as they have sufficient money of the appellee's in their own hands which was deposited for the purpose of paying in advance the very obligations on which judgment is sought.

The judgment is affirmed.

---

83	84
882	857

**J. D. BOWLAND, Appellee, v. THE McDONALD INDEPENDENT TELEPHONE COMPANY, Appellant.**

No. 16,393.

SYLLABUS BY THE COURT.

1. **HIGHWAYS—Secondary Evidence of Existence—Road Records Destroyed.** In December, 1905, the records of Rawlins county, including the road records, were destroyed by fire. In an action in the district court, where the only question involved was whether a certain section-line road in that county is sixty feet or only forty feet wide, the defendant sought by secondary evidence to show that a sixty-foot road had been established along the line, that it had been traveled by the public ever since the year 1886, and had been worked at public expense long prior to 1897. *Held*, error to exclude the testimony. The destruction of the road records having been shown, the evidence offered for the purpose of proving the existence of a sixty-foot road was the best evidence that could be obtained.
2. ——— **Establishment—Existing Road Not Vacated.** Where a public road sixty feet wide has been legally established on a section line, and no proceedings have been taken to vacate any part of the same, the board of county commissioners has no authority to grant a petition establishing on the same line a road forty feet wide.

Appeal from Rawlins district court; WILLIAM H. PRATT, judge. Opinion filed March 12, 1910. Reversed.

*M. A. Wilson*, and *Gomer Thomas*, for the appellant.

*J. P. Noble*, and *Fred Robertson*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff brought this action in forcible detention, alleging that he is the owner of lands in Rawlins county, consisting of 240 acres, and that the defendant unlawfully and forcibly keeps him out of the possession of a strip of land seven feet wide along the north side thereof. The defendant is a Kansas corporation, engaged in conducting a telephone business, and claims that the strip of land in question is a part of a public highway, and that it has a right to place its telephone poles there so long as the same do not materially interfere with public travel. The case was tried to a jury, and at the close of the evidence the court instructed a verdict for the plaintiff. Judgment was rendered upon the verdict, and the defendant appeals.

The plaintiff attempted to prove that the road in question is forty feet wide and that the defendant had placed its poles on a line seven feet outside of the same, and on his land. It was the contention of the defendant that the poles were in the road and that the road is sixty feet wide. The plaintiff introduced the record of proceedings before the board of county commissioners upon a petition of his own for the establishment of a road forty feet wide. An order was granted in compliance with the petition, and was dated July 5, 1907. If the road is sixty feet in width, then the line of telephone poles is in the highway, and judgment should have been rendered for the defendant. Under the provisions of sections 1252 (Laws 1885, ch. 104, § 2) and 1342 (Gen. Stat. 1868, ch. 23, § 74) of the General Statutes of 1901 the defendant has the right to place its poles in public highways. (*Wichita v. Telephone Co.*, 70 Kan. 441.) If, on the other hand, the contention of the plaintiff is correct, and the road is forty feet wide, the line of poles is seven feet off the highway and on the land of the plaintiff, so that the whole question at issue was the width of the road as legally established.

One claim of the defendant is that the highway was established by law and that it was unnecessary to show proceedings for laying out the same upon petition. The law relied upon is chapter 215 of the Laws of 1887. Section 1 of that act reads as follows:

"That all section lines in the counties of Graham, Rawlins, Ness, Lane, Stafford, Decatur, Thomas, Sherman and Trego, in the state of Kansas, be and the same are hereby declared to be public highways, and to be of the width of sixty feet."

The defendant also relied upon the provisions of chapter 176 of the Laws of 1897, entitled "An act to legalize certain roads in Rawlins county." The first section of that act reads as follows:

"That all roads and highways on section lines in Rawlins county that have been opened by order of any of the road overseers and work done under any of said road overseer's supervision and at the public expense, prior to the first day of January, 1897, are hereby declared to be legally established, notwithstanding some omissions or irregularities."

Section 2 provides that the road overseer shall make report to the county clerk of such roads in his district, giving the location and full description of the same, on or before November 20, 1898, and the county clerk is required to make a record of such roads; that such roads shall be thereafter public highways through such districts, and the records of the county clerk shall be competent evidence of the validity and existence thereof, the same as if a full and complete record of the proper notices and other papers required to be recorded had been made and entered upon the journal of the board of county commissioners.

The records of Rawlins county, including the road records, were destroyed by fire December 5, 1905. The defendant, therefore, sought by secondary evidence to show that from 1886 a sixty-foot road had been established along this line. The principal claim of error is that the court ruled out its evidence offered for that

purpose. The defendant first offered in evidence what is known as the George A. Ogle atlas of Rawlins county, containing a plat of the township where the land in controversy is located showing this road to be sixty feet wide, and also offered to prove by the person who claimed to have made the plat for the publishers of the atlas that he made it from the original road records before they were destroyed. An objection to the evidence was sustained. The defendant also offered evidence for the purpose of showing that this road, sixty feet in width, had been worked at the public expense long prior to 1897, and had been traveled by the public since the year 1886; and then contended that, having proved this condition, there is a presumption that the road overseer of that district as well as the county clerk had performed their several duties under the act of 1897. The court refused to permit the proof. It was manifest error to exclude the testimony. The destruction of the road records of the county having been shown, the evidence offered by the defendant for the purpose of proving the existence of a sixty-foot road was clearly the best evidence that could be obtained.

It was not the intention of the legislature that section-line roads should be actually established by the mere declaration of the act of 1887; it required in addition thereto some action on the part of the proper authorities opening the road to public use. This is manifest by the language of section 3, which allows damages to the owner of land on either side of such section lines, but requires that the claim shall be presented within one year after the road is actually "opened to public use over and upon his land." (Laws 1887, ch. 215, § 3.) A claim for damages presented before the road has actually been opened to public use would be premature. It was, however, the purpose of the legislature to do away with the necessity of a petition to open a public road along any section line in the coun-



ties named, and to declare that such roads when opened should be sixty feet in width.

The act of 1897 was an enabling act curing omissions and irregularities in the action of the authorities opening such roads. The evidence which was excluded tended at least to establish that this section-line road had been opened and worked by the road overseer at public expense prior to 1897, and that it was sixty feet wide. If this were true, and if the road overseer had complied with the provisions of the act of 1897 and had reported the road to the county clerk, and the county clerk had made the record which that act provided he should make, the defendant could have established its contention by bringing in the records. Since the records were destroyed, the defendant should have been permitted to prove the facts by secondary evidence; and proof that the road had in fact been opened and worked at public expense would have tended to establish the existence of a legal road such as the defendant claimed. Apparently the trial court proceeded upon the theory that because the plaintiff had proved the granting of his petition in 1907 for a forty-foot road it was not competent for the defendant to prove that long prior thereto a public road had been legally established on that line sixty feet wide. In this we think the court committed error, even though the legislature had not declared that all section-line roads in Rawlins county should be sixty feet wide. If a legal road sixty feet in width was actually in existence, as defendant claims, it would require some sort of proceeding to vacate a part of it in order to make it forty feet wide. Section 2 of the act of 1887 provides that upon a proper petition the commissioners may vacate any portion of a section-line road found to be impracticable. It is not claimed that any proceedings were ever had for the purpose of vacating part of the highway in question.

In the face of the express declaration of the legisla-

ture that all section-line roads in Rawlins county shall be sixty feet wide, except where some portion thereof is vacated by the county commissioners upon a petition under the provisions of the general road law, it might be a serious question whether the commissioners have authority to grant a petition laying out a road of less width on section lines, or whether they have authority to entertain any petition for laying out a public road on section lines. These questions have not been suggested in the briefs or arguments and therefore need not be decided.

One other question remains. The plaintiff urges that the defendant is estopped to claim that the forty-foot road was not legally established because it appeared in the proceedings and presented a claim for damages. As we view it, there was no estoppel nor any inconsistency in the attitude of the defendant in this respect. Its claim for damages was predicated solely upon the claim that there was about to be established a road forty feet wide; it expressly disclaimed damages if its objection to the proceedings was held good.

For the error in excluding the testimony offered the judgment is reversed and the cause remanded for another trial.

---

Schick v. Warren.

---

CHARLES SCHICK, *Appellee*, v. THE WARREN MORTGAGE  
COMPANY, *Appellant*.

No. 16,394.

SYLLABUS BY THE COURT.

INSTRUCTIONS—*Direction to Consider Only Part of the Evidence*  
—*Withdrawal of Conflicting Testimony from Jury*—*Direction*  
*of Verdict*. Where a question of fact is presented to a jury,  
in the determination of which it is necessary to consider the  
entire evidence submitted, which is conflicting, it is error for  
the court to direct the attention of the jury to a small portion  
of the evidence and instruct them to return a verdict in favor  
of the plaintiff if such facts are established.

Appeal from Lyon district court; FREDERICK A.  
MECKEL, judge. Opinion filed March 12, 1910. Re-  
versed.

STATEMENT.

THIS is an action to recover a judgment for money. The appellant is a corporation engaged in loaning money and is located at Emporia, Kan. The appellee resides at Shenandoah, Iowa, where he has lived about thirty years and has been engaged in buying and selling real estate, farming, cattle raising, and in mercantile and banking business. He owned real estate in Butler county, Kansas, near the town of Atlanta, in Cowley county. There was a mortgage upon this land, amounting to \$2100 and some back interest, and there were some unpaid taxes. The appellee wanted to increase the amount of this loan to \$4000. J. M. Parrish resided at Atlanta, Cowley county. He had formerly resided at Shenandoah, Iowa, and was there acquainted with the appellee. The latter wrote to Parrish to obtain the loan desired, and afterward came to see about it in person. Parrish had been acting for the Warren Mortgage Company in obtaining loans for it, and had in his possession blank applications for loans. One of these applications was executed by the appellee and sent to the mortgage company. After an inspection of

---

Schick v. Warren.

---

the land was made the appellant decided to make the loan, and notes and a mortgage were sent to the appellee at Shenandoah, Iowa, to be executed by him and his wife. In addition to these papers two other instruments were executed by the appellee and sent to the mortgage company at the same time, which read:

"ATLANTA, KAN., October 20, 1905.

"I hereby authorize the Warren Mortgage Company to pay the proceeds of my loan of \$4000 to J. M. Parrish, my agent, who is authorized to receive the same and pay out as per my instructions.

CHARLES SCHICK, *Applicant.*"

"SHENANDOAH, IOWA, November 1, 1905.

"I hereby authorize the Warren Mortgage Company to pay the proceeds of my loan of \$4000 to J. M. Parrish, as agent, who is authorized to receive the same and pay off old mortgage and taxes and send balance to me.

CHARLES SCHICK,  
MARINTHA SCHICK,  
*Applicants.*"

Upon the receipt of these papers the appellant remitted to the appellee the sum of \$1500, and the remainder of the \$4000 was sent to J. M. Parrish, who has not accounted for the money received. The appellee commenced this action to recover the amount paid to Parrish, claiming that he was the agent of the Warren Mortgage Company when the money was paid to him. It is claimed by the appellee that the letter of transmittal to Parrish establishes this agency. The letter reads:

"Mr. J. M. Parrish, Atlanta, Kan.: 11-11-'05.

"DEAR SIR—We enclose you herein the supplemental abstract in the French loan, with check for \$2180, being the amount due on the loan, less the amount due Merriam. We also enclose letter from Merriam, with the statement of the amount due them, which please return to us at once when you have showed it to French. When you have taken up the bank release wire us, and we will remit to Merriam. Do not pay out a cent till you have the bank release, as we do not want to get caught in another Carroll scrape.

---

Schick v. Warren.

---

"We also enclose check for \$1600, in payment for the Silvey loan. Please take up this release, complete the abstract, and send us the completed abstracts, with the insurance policy, as soon as possible.

"We also enclose check for \$1683, in payment of the proceeds of the Huddleston loan. Please take up all deeds and releases, and send us the completed abstract as soon as possible.

"We also enclose check for \$450, in payment of the proceeds of the Goodman loan, and the abstract and mortgage to this company. To complete this title, we want:

"(1) Identify E. King and L. A. King at 3 and Ezekiel King and Lucy King at 4.

"(2) Identify J. H. Marshall at 4 and Joseph H. Marshall at 11.

"(3) Identify William Townsend at 11 and William S. Townsend at 12.

"(4) Deed from Luther F. Miller.

"(5) Record the mortgage and complete the abstract to date. Please obtain these affidavits, take up the deed, complete the abstract and return to us as soon as possible.

"We also enclose you the Schick abstract, with check for \$2500, being the proceeds of the loan, less your draft for \$1500, which we have paid to-day. Please take up the releases at 1 and 3, complete the abstract to date, and return to us with the original as soon as possible.

"In all cases above, where insurance is called for, please see that the policies are sent to us as soon as possible.

Yours truly,

THE WARREN MORTGAGE COMPANY."

On the other hand the appellant claims that, it having been authorized in writing by the appellee to pay the money to Parrish, and such payment having been made, it is relieved from any further responsibility. The instruments whereby such authority was given were pleaded in the answer as a defense, and, the execution thereof not being denied, was admitted by the appellee. This question of agency was controlling in the case, and under the instructions of the court the jury re-

---

Schick v. Warren.

---

turned a verdict in favor of the plaintiff. The mortgage company brings the case here on appeal.

*L. B. Kellogg, W. L. Huggins, and C. M. Kellogg, for the appellant.*

*G. H. Buckman, and S. C. Bloss, for the appellee.*

The opinion of the court was delivered by

GRAVES, J.: The appellant contends that the court by its instructions committed serious error and practically directed a verdict for the plaintiff. The instructions complained of read:

"The defendant further claims that the plaintiff's \$4000 mortgage by its terms was to be a first mortgage upon said land, and that to make the same a first mortgage it was necessary that all liens and encumbrances then upon said land be paid off and discharged of record. And so if the jury shall find from the evidence in this case that the defendant remitted to said Parrish the \$2500, with the direction or intention that said Parrish should pay off all prior encumbrances on said Butler county land, so that the mortgage given to the defendant by the plaintiff should become a first lien on said land, then the said Parrish would be in law the agent of the defendant in receiving said \$2500.

"The slips of paper which have been introduced in evidence and which have been called 'authorization slips,' purport upon their face to constitute said Parrish the agent of the plaintiff to receive the proceeds of the loan and to pay off encumbrances, etc., and the signing thereof not being denied by the plaintiff in his pleadings, the execution thereof is admitted; under the issues made by the pleadings in the case, however, the jury are not bound by said slips as to whether the plaintiff in fact constituted said Parrish his agent for the purpose recited therein, but the question of agency is to be determined by you from all the facts and circumstances of the case, and in doing this it is your duty to go behind the technical wording of the instrument and from the entire evidence determine as a matter of fact the question of agency; the parties to a contract can not irrevocably fix the status of a third party in

---

Schick v. Warren.

---

his relation to them by calling him an agent of one of them, if the facts and circumstances show that such was not the fact."

We concur in the criticism made upon these instructions by the appellant. It will be seen that while the general theory of the court was that the question of agency was one of fact to be determined upon all the facts and circumstances shown by the evidence, the jury were limited to the contents of a letter from the appellant to Parrish, about which there was no contention. This left the jury no alternative. It was bound to find for the plaintiff. The letter mentioned in the instructions contained language specifically directing the payment and release of prior encumbrances. The general subject of the letter, however, related to business transactions having no connection whatever with the loan to the appellee. The reference made to this loan was merely incidental to the general purpose of the letter and contained suggestions that would naturally have been made to the appellee himself, being with reference to a matter in which they were mutually interested.

The appellant insists that the appellee, having in writing authorized and directed the payment of the money to Parrish as his agent, to be used in the release of the prior mortgage, the question of the agency of Parrish became one of law and not of fact. It does not appear, nor is it claimed, that the appellee was induced to execute this written authority on account of any fraud, mistake, misrepresentation or misunderstanding of any kind. On the contrary, it does appear that he executed the written paper freely and voluntarily and with full knowledge of the purpose for which it was to be used. While this and other circumstances were in evidence, they were excluded from the consideration of the jury by the instructions of the court. If the theory of the court concerning the question of agency was correct, then it should have been submitted

---

Bowers v. Railway Co.

---

to the jury upon the whole evidence. This was not done. On the contrary, it was submitted upon a mere fragment of the evidence, which fragment was undisputed. In our view, therefore, the judgment must be reversed for this misdirection of the jury. This renders it unnecessary to consider the question whether the written authority given by the appellee to the appellant to pay the money to Parrish presented a question of law or not.

The judgment of the district court is reversed, with direction to grant the appellant a new trial.

---

**J. H. C. BOWERS, Appellee, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.**

No. 16,396.

**SYLLABUS BY THE COURT.**

1. **EVIDENCE—*Testimony by a Witness as to His State of Mind.*** Where the motive, intent or belief of a person is a material fact to be ascertained, and he is a competent witness to prove such condition, he may testify to it directly in connection with his testimony detailing the circumstances and situation in which he was acting at the time.
2. **RAILROADS—*Rules for Employees—Reasonableness—"Know" Defined.*** A rule of the railway company required a brakeman who had given a signal to the engineer to know that such signal had been seen, understood and obeyed before placing himself in a dangerous position. It is *held*, that this rule is reasonable and should be obeyed. It is further *held*, that the word "know," as used in this rule, has the sense in which it is ordinarily understood. It does not necessarily import absolute knowledge of a fact which actually exists, but it means the full assurance and belief to the exclusion of doubt or uncertainty of a reasonable and prudent man based upon convincing evidence addressed to his intelligence or senses.
3. **PERSONAL INJURIES—*Consistency of Findings—Evidence and Findings.*** The contentions that certain findings are inconsistent, that they do not support the verdict, and are not sustained by the evidence, are considered and held untenable.



Appeal from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed March 12, 1910. Affirmed.

STATEMENT.

THE appellee recovered a judgment against the railway company for injuries received at Harper, while in the employ of the company as a brakeman. From his evidence it appears that a freight train on which he was a brakeman ran between Medford and Hutchinson on a branch of the railway. At Harper this branch was connected by a "Y" with the Panhandle division, extending west from Wellington. When the plaintiff's train reached Harper it ran over the "Y" to the line of the Panhandle division and stopped in front of the depot, with the engine heading east. A short distance east of the depot the main street of the town crossed the track. The cars extended across the street and for some distance to the east, and it became necessary to divide the train at the crossing. The conductor directed the plaintiff to cut the train for this purpose. The plaintiff stepped in between the cars from the south, or right hand, side of the train and uncoupled the air hose. Having done this he stepped out on the same side from between the cars, grasped the lever operating the pin in the automatic coupler, and endeavored to pull it, but was unable to do so because of the tension in the couplers which bound the pin and prevented its release. He thereupon signaled the engineer for slack to relieve the tension. He gave this signal with his right hand, while holding to the lever with his left hand. The engineer backed the engine sufficiently to give the necessary slack, the plaintiff immediately pulled the pin, and the uncoupling was accomplished, leaving three or four cars west of the crossing. He then gave the engineer a signal to go forward and clear the crossing. In order to do this it was necessary for the forward part of the train to move east-

---

Bowers v. Railway Co.

---

ward about the length of two cars—sixty or seventy feet. In obedience to this second signal, the forward portion of the train, consisting of fifteen or sixteen cars and the engine, moved eastward a distance of ten or twelve feet from the rear portion. The plaintiff watched it until it had moved that far, and, believing that the engineer had seen and understood his last signal, and was obeying it by pulling the forward portion of the train across the street, he stepped in between the two sections of the train to turn the angle cock on the air hose of the standing cars, in order to set the brakes on those cars and prevent them from running eastward of their own weight, as there was a down grade toward the east at that point. While performing this act, with his back toward the engine, the forward part of the train backed up and caught him between the bumpers and between the knuckles of the couplings, crushing his arm between the elbow and the shoulder. He had pulled the angle cock with his right hand and was holding the hose with his left knee. His face was turned to the west. While doing this work the movement of the engine and train was under the control of the plaintiff, the engineer being subject to his orders for the time being. The plaintiff had knowledge of the following rules, in effect at the time:

“Rule 313. It is alike dangerous to assume that signals given to the engineman or fireman have been seen, and if seen will be obeyed, when obedience to those signals on the part of the engineman or fireman is essential to the safety of an employee in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position; otherwise, without such knowledge, he assumes all risk of danger arising from any misunderstanding or disregard of signals.

“To enter or remain in the service is an assurance of willingness to obey the rules. Obedience to the rules is essential to the safety of passengers and employees and to the protection of property.”

In making application for employment the plaintiff answered "Yes" to the following question:

"Do you understand that any employee of this company whose duties are in any way prescribed by the rules must always have a copy of the rules at hand when on duty and must be conversant with every rule, and that you must render all assistance in your power in carrying them out and immediately report any infringement of them to the head of your department, and do you agree that such rules, including any changes therein or additions thereto from time to time, shall be a part of your contract of employment?"

A demurrer to the evidence, interposed by the defendant, was overruled, the defendant excepting.

The engineer testified that he received the signal for slack and in obeying it he only succeeded in moving the train back a little, when he received from the plaintiff a second signal for slack; that he then moved forward a little to get initial velocity to permit moving the train back, and then pushed the train back; that he supposed the first movement backward was not far enough to relieve the tension sufficiently to loosen the pin; that it was necessary to go forward and then back to accomplish this purpose; that in doing so he was obeying the plaintiff's second signal, and that he did not receive any signal to go forward.

It was shown that sometimes an engine is unable to move a heavy train upgrade at the first effort, and, when the engine is so unable to move a train, in order to make a second effort it goes the other way to get slack, in the manner testified to by the engineer. It was necessary to turn the angle cocks to hold the cars which had been cut off from moving forward of their own weight. Some rain had fallen, and there was some mist in the air. The petition alleges that the injury was caused:

"By the negligence of the engineer . . . in negligently and carelessly moving the front section of said train backward without a signal therefor when he

---

Bowers v. Railway Co.

---

knew or might have known, and ought to have known, that the plaintiff was on the track between the two sections of said train."

Over the objections of the defendant the plaintiff was allowed to testify that after signaling the engineer to go ahead, and before going between the cars, he satisfied himself that the engineer was moving the train off the crossing.

Instructions were asked to the effect (1) that although the plaintiff may have believed in good faith that the engineer had seen and understood the signal to go forward after the cars had been uncoupled, yet if without waiting for such signal to be obeyed he went in or remained in between the cars, and was injured because of the failure of the engineer to obey the signal, there could be no recovery; (2) that the plaintiff was not authorized to go between the cars until he knew that the signal to go forward had been obeyed; (3) that the mere fact (if it be a fact) that the plaintiff believed in good faith, while acting with reasonable prudence, that the engineer had seen, understood and obeyed a signal to go ahead would not avail if he was mistaken in this belief, however well founded his belief may have been.

In answer to special questions the jury found, in substance, that the engineer did not exercise proper care in moving his engine, nor to ascertain whether it was safe for him to move his train backward as he did; that after moving forward it was not proper to move backward without waiting for a signal from the plaintiff and without ascertaining whether he was in a place of safety; that the plaintiff was justified in believing and acting on the belief that the engineer had seen, understood and obeyed the signal to go forward; that the plaintiff gave the signal to back up so that he might pull the pin and uncouple the train; that after the engineer made the first effort to back he started his

engine forward to take slack so that he could more effectively back the train; that when he pulled ahead to do this he was under the impression that the train had not parted, and that it was necessary to go forward to get slack to go backward; that in doing this he did not honestly believe that he was obeying the signal to back up; that he did not honestly believe that his acts in first attempting to back the train, then in going forward to take slack and again attempting to go backward, were acts necessary to be performed to obey the plaintiff's signal; that the engineer could not see that the cars were parted by looking from his position just prior to reversing the engine and backing it, and after the plaintiff had uncoupled the cars the engineer did not learn that they were uncoupled before moving his train back; that when the train separated the plaintiff did not wait to see whether it would move forward far enough to clear the crossing before he went in between the cars to adjust the air; that it was necessary for him to act in a hurry in going between the cars to turn the angle cocks, and that in doing so he obeyed rule 313, but that he gave no signal that he was about to go between the cars; that after the plaintiff had uncoupled the cars the engineer observed and understood a signal from the plaintiff directing him to move ahead, and he saw the plaintiff's arm and part of his body when giving the signal; that, according to the regulations, if the engineer had failed in the first attempt to back his train in response to a signal to do so he should have waited for another signal; that it was not necessary in this case to take slack by moving forward and then reversing the engine for backing; and that after the train had moved forward ten or twelve feet, and the plaintiff stepped in to turn the angle cock, he did not notice or give attention to the cars in front of him.

*William R. Smith, O. J. Wood, and Alfred A. Scott,*  
for the appellant.

*W. W. Schwinn,* for the appellee.

The opinion of the court was delivered by

BENSON, J.: The errors assigned relate to the admission of testimony, the instructions given and refused, the inconsistency of the findings, and the sufficiency of the evidence.

After describing the situation, and stating that the section of the train then moving forward had proceeded far enough to leave a space of ten or twelve feet upon the crossing between the front of the standing cars and the rear end of the last car moving to the east, the plaintiff was allowed to testify that he had satisfied himself that the section in front was moving off the crossing; that is, in connection with the circumstances detailed he was permitted to testify to his belief of a fact—to explain why he then stepped into this space to adjust the air brakes. In a situation like that in which the plaintiff was placed testimony of belief is proper.

“The condition of a man’s mind with reference to what he thinks, feels, believes, intends, and his motives, is always a fact, and it is a fact which is often required to be ascertained both in civil and in criminal cases; and only one person in the world has any actual knowledge concerning that fact, and that person is the one whose condition of mind is in question; and where he is a competent witness to prove such condition he may testify to the same directly. Other witnesses can testify only to extraneous facts tending to prove this condition. He may also testify to such extraneous facts, but he may testify directly as to what the condition of his own mind is or was at any particular time, or on any particular occasion.” (*Cardom v. Woodward*, 44 Kan. 758, 761.)

This rule is supported by a note following the report of the above case in 21 Am. St. Rep. 314. The argu-

ment to the contrary is generally repudiated. (3 Wig. Ev. § 1965.)

The instructions requested were to the effect that the plaintiff's belief was immaterial; that under rule 313 he was bound to *know* that his signal had been understood and heeded, and bound to wait until the train was clear of the crossing before going into the space between the two sections of the train. Instead of the instructions requested the court gave the following:

"(17) Under the defendant's rule 313, which has been introduced before you in this case, it was the duty of the plaintiff, before placing himself in a dangerous position between the cars at the time in question, not only to know that his signal or signals, if any he gave to the engineman or fireman, had not only been seen and understood by such party or parties, but it was plaintiff's duty also to know that such signal had been obeyed; and even though plaintiff knew that any such signal given by him was seen and understood by the party to whom he gave the signal, yet, if without waiting to see and know that such signal would be obeyed, plaintiff went in between the cars at the time and place in question and received any of the injuries complained of, and such injuries were caused by reason of plaintiff's failure to wait and learn that such signal had been obeyed as well as seen and understood by the party to whom it was directed, then your verdict should be for the defendant.

"(18) The word 'know,' as used in rule 313, has the sense in which it is ordinarily understood. It does not necessarily import absolute knowledge of a fact which actually exists, but it means full assurance and belief to the exclusion of doubt or uncertainty of a reasonable and prudent man based upon convincing evidence addressed to his intelligence or senses.

If absolute certainty of the fact is required by the language of the rule, the instruction given was erroneous and the one requested should have been given. A brakeman in such a situation, sixteen car lengths from the engine, can not "know that the engineer has seen, understood and obeyed" his signal otherwise than by

---

Bowers v. Railway Co.

---

observing what the engineer does in response to it, and whether he acts in obedience to the rule in view of such observation is a question for the jury. Mr. Justice Strong, in *Shaw v. Railroad Co.*, 101 U. S. 557, said: "It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being." (Page 566.)

It is possible that some further qualifications should be added to this definition in interpreting the rule in question, but it should not be construed so as to prevent action until absolute certainty beyond all possibility of mistake—if that is ever attainable—is reached. So to hold might delay operation, or prevent action when imperatively necessary, and lead to results more serious than those the rule was designed to prevent. Even in criminal prosecutions for receiving stolen property knowing it to have been stolen it is held, as stated in a case note in 22 L. R. A., n. s., 833, that "in no case has it been held that absolute knowledge must be shown in such prosecution, though it is frequently said that there must be more than a mere belief or supposition that the goods had been stolen." The appellant has no ground to complain of the interpretation of the rule given by the district court nor of the other instructions given.

It is contended that the findings that when the engineer moved forward to get slack he did not believe that he was obeying the plaintiff's signal, and that he did not honestly believe that such acts were necessary to obey the signal, are contrary to the undisputed evidence. It is true that they are contrary to the engineer's testimony, but the plaintiff testified that he gave but one signal for slack, and the jury found this to be true. The engineer could not honestly obey, or obey at all, a second signal which had not been given. But it is said that these findings are inconsistent with others wherein the jury stated that in going forward and then back the engineer could more effectually



---

Bowers v. Railway Co.

---

back the train, and that he was then under the impression that the train had not parted and that this course was necessary. All this may have been true, as the jury found, and yet it may have been true, as the jury also found, that he did not do this in obedience to any signal. In other words, acting upon a mistaken assumption, he proceeded without signals to do the acts which injured the plaintiff. It was his duty to be governed by the signals. It is true he testified that he received a signal, which, had it been given, would have authorized the act; but the jury have said that such a signal was not given, therefore it could not have been received, and this finding, approved by the district court, determines the fact.

It is contended that the evidence does not support the allegation that the engineer knew or ought to have known that the plaintiff was between the cars when he moved the train backward. The engineer knew that the purpose of this movement was to release the pin that the cars might be uncoupled to open the train at the crossing. He knew that the duties of the brakeman required him to go between the cars. He testified: "If I had looked and noticed Johnnie Bowers was out of sight I would have concluded that he was between the cars." That was the place he would naturally expect him to be after the train moved forward sufficiently to impart to the plaintiff knowledge that his signal had been obeyed. Upon all the evidence it can not be held that there was no testimony to support the material findings.

Some minor rulings were excepted to, but are not commented upon. No error is found in the proceedings. The judgment is affirmed.

EFFIE V. LESS, *Appellant*, v. G. W. YEATS, *Appellee*.

No. 16,897.

SYLLABUS BY THE COURT.

1. **COMPROMISE TAX DEED**—*Separate Sale of Contiguous Lots—Consideration—Taxes Compromised.* A compromise tax deed which had been of record more than five years purported to convey a block of ground in a city. Four of the lots were sold separately for a specified amount, eight of the lots were sold together for a stated sum, and the remaining sixteen lots of the block were sold together for a single consideration. The lots so sold constituted the entire block, and all were owned by the same person. The recitals showed that the subsequent taxes for each year after the sale and before the compromise were included in a single charge, and all taxes, interest and charges against the entire block were compromised and the interest of the county assigned for one gross sum. In an attack on the deed because it did not state the consideration for which each lot was sold and conveyed it is held, that the instrument is not void on its face for that reason; that it contains the essential recitals of a compromise tax deed; and that it is not void because the compromise did not include the taxes of the year in which it was made.
2. ——— *Acknowledgment of Execution by County Clerk.* An abbreviated acknowledgment of the execution of the tax deed held to be sufficient.

Appeal from Hamilton district court; WILLIAM H. THOMPSON, judge. Opinion filed March 12, 1910. Affirmed.

*George Getty*, for the appellant.

*U. T. Tapscott*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This case involves the validity of a compromise tax deed which was of record more than five years before the action was brought and which purports to convey an entire block in the city of Coolidge. Effie V. Less, who claimed the patent title, brought an action to recover the block from G. W.

Yeats, who was in possession and who claimed title under a tax deed issued on June 15, 1897, and recorded on June 22 of that year. Whether that tax deed is good on its face is the question upon which the parties have divided.

One defect to which attention is called is that the deed does not show the consideration for which each lot of the block was sold. It recites that in 1889 four of the lots in the block were sold separately for the payment of specific sums charged against them; that eight lots of the block were sold to pay a stated sum charged against them; that the sixteen remaining lots of the block were sold to pay a specific amount charged against them; and that as no person offered to pay the taxes and charges on the lots they were bid off to the county for the total amount of the taxes therein stated, which was the least amount bid for them. It is further recited that in charging up the subsequent taxes for the succeeding years from 1888 to 1895, inclusive, the whole block was included under a single charge each year, and as the lots remained unredeemed more than three years and no person offered to purchase the same for the taxes, charges and interest thereon the board of county commissioners, by resolution of October 19, 1896, authorized the county treasurer to execute and the county clerk to assign the certificates to L. M. C. Brown for \$3.25, and this was done on November 13, 1896. Subsequently Brown assigned the tax-sale certificate and his interest in the property to Jacob W. Shirley, to whom the deed was executed. The contention is that each lot of the block should have been sold separately, but this is not essential to a valid conveyance of contiguous lots or parcels of land. The lots in question are all in the same block and constitute the entire block. It is conceded that all were owned by the same person, and no reason is apparent why they might not have been assessed as a single parcel or tract. The recitals, it is said, indicate that the lots were sold for different amounts, and hence must have been of differ-

ent values, and so it is said that a person desiring to redeem a single lot or group of lots could not have ascertained the amount necessary to redeem any one of them. The county commissioners determined, as they had a right to, what the compromise should be and what payments should be made for an assignment and transfer of the interest of the county. The recitals necessary to a valid compromise tax deed are contained in the instrument executed. (*Douglass v. Wilson*, 31 Kan. 565.) In arranging the compromise the commissioners could and probably did take cognizance of whether by reason of improvements or changes of ownership there was any reason for severance of contiguous lots or for separate statements as to how much of the consideration was for any particular part of the block. The owner had five years after the deed was recorded to show that such severance and separate recital was necessary for his protection, but after that time elapsed every reasonable presumption must be indulged in support of the deed, and on that theory no invalidity appears. If a person desired to redeem any of the lots or groups of lots included in the block, the amount necessary to redeem each could have been ascertained by the rule of apportionment laid down in *Nagle v. Tieperman*, 74 Kan. 32, *Kessler v. Polkosky*, 81 Kan. 69, and *Van Hall v. Goertz*, post.

The failure to include the taxes of 1896 in the compromise does not affect the validity of the tax deed. In the first place the compromise was made in October before the taxes for the year 1896 became a lien on the lots, and in the second place it was competent for the county commissioners to arrange a compromise on the basis that the taxes for that year should be paid in full.

The acknowledgment of the deed is attacked because it does not sufficiently show that the officer who executed it was the county clerk of Hamilton county, or that he executed or acknowledged the execution of the same as county clerk of that county and was known to

---

Less v. Yeats.

---

the one taking the acknowledgment to be such officer. The acknowledgment follows:

"State of Kansas, County of Hamilton, ss.

"I hereby certify that before me, a register of deeds in and for said county, personally appeared the above-named John Wensinger, county clerk, personally known to me to be such, and he duly acknowledged the execution of the same to be his act as county clerk as provided by law.

"Witness my hand and official seal this 15th day of June, A. D. 1897.

FANNY R. STARKEY,  
*Register of Deeds.*"

[SEAL]

There is no difficulty in learning from the instrument that John Wensinger, who had executed the deed as county clerk of Hamilton county and had affixed the official seal of the county to the deed, was the county clerk of the county and that he acknowledged the tax deed in that capacity. The acknowledgment, although not as elaborate as the form ordinarily used, seems to include every essential element.

The contention that Yeats had opened the tax deed to attack for irregularities notwithstanding it was more than five years old by asking to have his title quieted as against Less is negatively answered by the recent ruling in *Trust Co. v. Jones*, 81 Kan. 753.

No substantial error appearing in the record, the judgment is affirmed.

A. B. COOPER, *Appellee*, v. JOHN RHEA, *Appellant*.

No. 16,404.

## SYLLABUS BY THE COURT.

1. **JUDGMENTS—Vacation—Mistake—Issues Presented by Pleadings—“Irregularity.”** Under the provision (Civ. Code, § 568, subdiv. 3; Gen. Stat. 1901, § 5054, subdiv. 3) that a judgment may be set aside at a subsequent term “for mistake, neglect or omission of the clerk, or irregularity in obtaining” it, a court may vacate a judgment rendered on the pleadings because of a misapprehension as to what allegations they in fact contained.
2. **LIMITATION OF ACTIONS—Removal of Cloud from Title.** The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitation is not applicable.
3. **FORECLOSURE—Recovery against Defendant Not in Privity with Mortgagor—Proof that the Mortgagor Had Title.** In an action brought to foreclose a mortgage, in order to establish a ground of recovery against a defendant who does not claim under its maker, the plaintiff is required to show that the mortgagor had title to the property, so that the mortgage created a lien.

Appeal from Trego district court; JACOB C. RUPPEN-  
THAL, judge. Opinion filed March 12, 1910. Reversed.

*S. M. Hutzel*, and *A. D. Gilkeson*, for the appellant.

*W. E. Saum*, for the appellee.

The opinion of the court was delivered by

MASON, J.: A. B. Cooper began an action upon several coupons more than five years past due, asking the foreclosure of a real-estate mortgage given to secure the bond from which they had been clipped. The mortgagors, who are not shown to have otherwise encumbered or conveyed their title, were named as defendants, the petition alleging that they had been absent from the state long enough so that the bar of the statute of limitation had not fallen. They do not appear to have

been served, and the plaintiff dismissed the case as to them. John Rhea was made a defendant under the allegation that he claimed an interest in the mortgaged property, but that any right he had therein was inferior to the lien of the plaintiff. He filed an answer alleging, among other matters, that the plaintiff's cause of action had not accrued within five years prior to the commencement of the suit. The plaintiff demurred to this part of the answer. On December 17, 1906, the court overruled this demurrer, and, as the plaintiff declined to plead further, gave judgment for Rhea. After the lapse of the term the plaintiff filed a motion to open this judgment, on the ground that he had misunderstood the character of the answer when he elected to stand upon his demurrer. On November 8, 1907, the court sustained the motion and set aside the judgment. Thereafter Rhea filed an amended answer, consisting of a general denial and a plea of the five-year statute of limitation. A trial was then had. The plaintiff introduced the coupons. No other evidence was offered by either party. Judgment was rendered for the plaintiff ordering a sale of the property and barring all claims of Rhea, who appeals.

The first question presented is whether the court erred in vacating the original judgment. The plaintiff made affidavit that at the time the judgment was rendered he understood that the parties and the court had agreed that the answer was to be amended so as to set out a tax deed, and that it was to be treated at the hearing on the demurrer as though such amendment had already been made. He also introduced an affidavit of the former judge of the court, who presided when the judgment was rendered, stating that he had understood that to be the situation and had acted upon that understanding. It therefore was shown that the judgment was rendered on the pleadings while the court and the losing party were under a mistaken impression as to what issues they presented. The power of

the court to correct such an error, even at a subsequent term, is so essential to the orderly administration of justice that it ought not to be denied unless in virtue of legislation admitting no other reasonable construction. A judgment so rendered does not express the real purpose of the court. The situation it presents is analogous to that arising when the record made does not conform to the action really taken. It is as necessary that a speedy remedy should be afforded in the one case as in the other. In many states a mistake of fact is recognized as an independent ground for vacating a judgment after the term has lapsed. (23 Cyc. 931; 15 Encyc. Pl. & Pr. 245.) Here authority for such action must be found, if at all, under the provision that a court may vacate or modify its own judgment "for mistake, neglect or omission of the clerk, or irregularity in obtaining" it. (Civ. Code, § 568, subdiv. 3; Gen. Stat. 1901, § 5054, subdiv. 3.) Assuming that the "mistake" referred to in the language quoted can only be that of the clerk, the word "irregularity" must be given a broad enough meaning to cover a case where the court has acted upon an erroneous understanding of the facts. Such has been the practical construction placed upon it. (*Small and others v. Douthitt and others*, 1 Kan. 335; *Tobie v. Comm'rs of Brown Co.*, 20 Kan. 14; *Murphy & Bros. v. Swadner*, 34 Ohio St. 672.)

A specific objection is made to the order opening the judgment on the ground that the plaintiff did not, as required by the statute (Civ. Code, § 572; Gen. Stat. 1901, § 5058; *Schuler v. Fowler*, 63 Kan. 98), make a showing that he had a valid cause of action. His affidavit set out that he believed he had a complete defense to the answer. Under the circumstances of the case—the real issue being one of law—this must be deemed sufficient.

The defendant maintains that his plea of the statute of limitation was good. He could not, however, take advantage of the fact that the coupons were more than



five years overdue unless he claimed under their makers. (*Ordway v. Cowles*, 45 Kan. 447.) His answer was silent as to the nature of his interest in the land, and therefore did not show that he was not in privity with the mortgagors; but in order to avail himself of the plea that the mortgage was barred he was required affirmatively to show that he held under them. (*Trust Co. v. Parker*, 65 Kan. 819; 27 Cyc. 1562.) Inasmuch as he did not place himself in a position to assert that the coupons were outlawed, the five-year statute of limitation did not protect him. If he did not claim through the mortgagors the fact that the action accrued five years before it was brought was no defense. In that case it was as to him in effect an action to remove a cloud from the title and the statute of limitation was not applicable.

"It is an acknowledged branch of equity jurisdiction to remove clouds from the title at the suit of the owner of the fee. Such owner has a right to invoke this aid. But must he do it within ten years after the commencement of the cloud, or may he do it at any time during its existence while he continues such owner? . . . This is a continuing right that may be asserted at any time during the existence of the cloud; never barred by the statute of limitations while the cloud continues to exist. This results from the continuing character of the right, which is equally as potent after the lapse of eleven years as it was during the first ten." (*Miner v. Beekman et al.*, 50 N. Y. 337, 343.)

"While a cause of action clearly accrues to the owner of real property in possession thereof whenever a cloud upon his title is created or an adverse title asserted, we do not think it necessarily follows that such cause of action accrues then once for all, so as to start the statute of limitations from that date. A cloud upon a title must always continue to operate as such during the period of its existence, and, as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud remains." (*Batty v. City of Hastings*, 63 Neb. 26, 29.)

(See, also, *Smith v. Matthews*, 81 Cal. 120; *Schoener et al. v. Lissauer et al.*, 107 N. Y. 111, 117; *Anderson v. Akard*, 15 Lea (Tenn.) 182; *Wagner v. Law*, 3 Wash. 500.)

The dismissal of the case as to the mortgagors gave rise to an anomalous situation. It left the plaintiff prosecuting what was nominally the foreclosure of a mortgage without the mortgagor or any successor to his title being a party—with no defendant in court excepting one presumably claiming under an adverse title. Such a proceeding could only be in effect an action to protect the lien of the holder of the mortgage—analagous to a suit to quiet title. Under some circumstances a remedy of that kind might be necessary. For instance, before an action to foreclose a mortgage accrued a tax deed might be taken out, good on its face but in fact voidable. If the mortgagor refused to act probably the mortgagee might invoke the aid of a court of equity to set aside the deed before the passage of time made it invulnerable. Possibly conditions not disclosed by the petition justified the plaintiff in maintaining a separate action against Rhea. But he failed in his proof. By introducing the coupons in evidence he sufficiently showed that he owned them, and their execution, as well as that of the mortgage and bond, was admitted. But he made no attempt to establish that the mortgagors ever had any title to the mortgaged property, a fact that was essential to the claim of a lien on his part. Therefore he made out no case whatever, and was not entitled to the judgment rendered or to any other judgment against Rhea. (*Ordway v. Cowles*, 45 Kan. 447.)

The litigation was conducted on each side with such finesse that the court is not greatly enlightened as to the claims of either party. The plaintiff dismissed the mortgagors from the case, and so left it to proceed without the owner of the fee—generally regarded as the one indispensable party to a foreclosure suit

---

Pilgrim v. Verdigris.

---

(*Britton v. Hunt*, 9 Kan. 228)—probably under the impression that their presence in some way made the statute of limitation a menace, possibly for fear that they might answer and plead it. The defendant refrained from disclosing the nature of his claim, perhaps because by doing so he would have shown affirmatively that he had no standing to assert that the coupons were outlawed. Neither gave evidence of having any interest in the property, but as the burden of proof was on the plaintiff rather than on the defendant he was not entitled to relief.

The judgment is reversed and the cause remanded for further proceedings in accordance herewith.

---

BELLE PILGRIM, *Appellant*, v. THE VERDIGRIS VALLEY  
BRICK AND TILE COMPANY, *Appellee*.

No. 16,405.

SYLLABUS BY THE COURT.

1. MASTER AND SERVANT—*Injury to Employee—Proof of Negligence—Duty of Master—Proximate Cause*. In an action by the next of kin of a deceased against an employer for damages consequent to the death, which occurred from injuries received while the decedent was laboring for the employer, it devolves upon the plaintiff to allege and establish by evidence that the injury occurred through the omission of some duty which the master owed to the employee and that such omission was the proximate cause of the injury.
2. ——— *Demurrer to Evidence*. When upon the trial of such a case the plaintiff has introduced his evidence and rested his case, and has failed *prima facie* to establish such facts, an order sustaining a demurrer to his evidence is proper.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed March 12, 1910. Affirmed.

*T. J. Hudson*, and *D. J. Sheedy*, for the appellant.

*Frank Woodard*, and *A. L. Berger*, for the appellee.

The opinion of the court was delivered by

SMITH, J.: For some months John E. Pilgrim had been employed by the defendant company as a "buzzard," as it is called; that is to say, he did whatever he was directed to do by the management. On the day of the accident he was directed to assist in mining shale to be used in making brick. While so engaged with another employee the bank caved upon them, and Pilgrim was so injured thereby that two days thereafter he died from the injuries. The plaintiff is the widow of Pilgrim and brought this suit for her damages in the loss of her husband. The sole charge of negligence against the defendant and its employees in charge of the brick plant and mine is that "the management of the said defendant neglected to properly inspect and look after the condition of the mine and face of the bluff above, where the deceased was at work, as required by the defendant." The answer was (1) a general denial, (2) contributory negligence, and (3) assumption of risk by deceased.

The trial was commenced with a jury, and proceeded so far that the plaintiff introduced her evidence and rested her case, and thereupon the defendant interposed a demurrer to such evidence, which the court sustained. The motion of the plaintiff for a new trial was denied, and judgment was rendered against her for costs.

The evidence, so far as it relates to the necessity of inspection and failure to inspect the mine and bluff extending above, is, in substance, that the bluff extended above where the accident occurred thirty to thirty-five feet; that there were two benches in the face of the bluff, on the lower of which the deceased and one Fowler were at work; that one Bean was in charge of the shale pit, and it was his duty to inspect it; that Bean and Fowler had been on the bench above

where Pilgrim was at work about two hours before the accident occurred; that shortly before the cave-in which injured Pilgrim occurred a small piece of shale fell from above, but it does not appear that Bean had any knowledge of it. There is no evidence as to whether Bean or any one else had or had not inspected the mine or bluff at any time, or as to the nature of the shale or material of the bluff above, or whether there was reasonable ground to apprehend and guard against the calamity which happened.

We think the bald fact that a cave-in occurred is not alone sufficient to make even a *prima facie* case that it should in the exercise of reasonable care have been apprehended and guarded against. It is a matter of common knowledge that some shales are very friable while others are quite coherent. Besides, it appears that the face of the bluff where Pilgrim and Fowler were at work was so coherent as to require blasting to dislodge it, but it does not appear whether or not the face of the bluff above was of like character.

It devolved upon the plaintiff not only to allege but to prove that the nature of the labor required of the deceased and of the place where it was to be performed was such that the defendant had reasonable ground to apprehend the danger which befell, and failed to use reasonable precaution in the way of inspection to avoid it. It appears that no such evidence was produced.

From the evidence that it was Bean's duty to inspect the mine and bluff it should fairly be inferred that the company recognized such inspection as necessary. Still, in the absence of any evidence that the duty was not performed or for what purpose the inspection was to be made, the proof falls far short of establishing any liability against the company.

The plaintiff states that *Brick Co. v. Shanks*, 69 Kan. 306, is "on all fours with this case and disposes of every phase of our contention." It is true the accident out of which the ground of action arose in that case oc-

curred in mining shale to be used in the manufacture of brick. The cases appear to be similar in no other respect. The following excerpt from the opinion therein distinguishes it completely from this case:

"The pit-boss undertook to perform the function of the vigilant eye and ear and the cautious judgment for his men, in consideration of which they surrendered the use of their own faculties and yielded the right of relying upon their own capabilities for protection. The risk of danger from the spontaneous caving of banks, from the falling of blocks of shale loosened by natural agencies, and from other similar causes, was doubtless assumed. Such perils inhered in the work and could be foreseen by the men as well as by the master. But the conduct of the work of drilling and casting down shale was properly subject to regulation, and under the rule of the pit that he should work while the foreman watched, the plaintiff was not bound to observe anything connected with the operations of the drillers except the warnings which the pit-boss gave." (Page 309.)

The plaintiff also omitted any proof that no administrator of the estate of the deceased had been appointed. Such evidence is essential to establish her right of recovery. The omission may, however, have occurred through a supposed tacit admission of the fact by the defendant.

As a witness in her own behalf the plaintiff offered to testify that some three hours after the accident Bean, the defendant's foreman, told her that "it was his [Bean's] fault; that he had not had the mine looked after as he ought to have done." On objection this evidence was excluded, and the ruling is assigned as error. The remark does not appear to have been made in furthering or performing any duty or service Bean owed the defendant as its agent; hence it can not be regarded as an admission of, or on behalf of, the defendant. It appears to have been a mere recital in regard to a past transaction and is mere hearsay. Bean was a witness, and if he knew any facts that would have

---

Walrond v. Noyes.

---

tended to prove the conclusion he is claimed to have expressed he was competent to testify to such facts. No error was committed in the ruling.

The judgment is affirmed.

---

Z. T. WALROND *et ux.*, *Appellants*, v. ELMER E. NOYES  
*et al.*, *Appellees*.

No. 16,411.

SYLLABUS BY THE COURT.

1. SCHOOL LAND—*Forfeiture—Defective Return of Service of Notice—Parol Evidence.* A purchaser of school land made default in payment and the state took the statutory steps to declare a forfeiture of the contract. After forfeiture the land was sold to other purchasers, who went into possession and made improvements upon the land. After the lapse of more than ten years the first purchaser made a tender of the amount due upon his contract, which was refused. He then commenced an action of ejectment to recover the possession of the land from the second purchasers, upon the ground that the forfeiture proceedings were void. The forfeiture was claimed to be invalid because the return of the sheriff did not show a full compliance with the statute as to the service of notice. Upon the trial the court permitted the sheriff to state orally what he actually did in making such service, whereby the defect in the return was cured and the service was shown to be sufficient. *Held*, that the oral evidence was properly admitted.
2. ——— *Description of Land in Return of Notice of Forfeiture.* Where in such a case the sheriff's return describes the land where notice of forfeiture was served as the "S. W. S. W. 36-9-13," such description does not render the service void, where the notice upon which the return is written contains an accurate description of the land, to which the return refers as the "within-named" land.
3. ——— *Record of Forfeiture Proceedings—Prima Facie Evidence of a Forfeiture.* Where the county clerk keeps a book in his office in which school lands sold are recorded and in which forfeitures are noted, and there are notations in such record opposite lands described therein which read, "Notice issued December 2, 1895," and "Forfeited February 23, 1896,"

---

Walrond v. Noyes.

---

such notations are *prima facie* evidence that such lands were forfeited at the date stated.

4. ——— *Retrospective Law — Validity.* Chapter 373 of the Laws of 1907 was intended to operate retroactively, and is not void for that reason.

Appeal from Osborne district court; RICHARD M. PICKLER, judge. Opinion filed March 12, 1910. Affirmed.

STATEMENT.

THIS is an action of ejectment. The plaintiffs owned a section of school land in Osborne county and occupied and improved the same until 1889, when they removed to Oklahoma. They continued to control and rent the land until 1893. After this date the interest due the state and the taxes were not paid. In December, 1895, proceedings were had to forfeit the sale, and the land was sold by the state to other purchasers, who took possession of the land and have ever since occupied and claimed the same under such purchase.

On May 11, 1907, the plaintiffs tendered to the county treasurer of Osborne county the full amount due upon their certificate of purchase up to that date, which tender was by the treasurer refused.

Afterward the plaintiffs commenced actions of ejectment and for rents and profits against the purchasers of the land, and these actions were subsequently consolidated into this action and were tried as one case. The trial was to the court, without a jury. Findings of fact and conclusions of law were filed by the court, but on account of their length and the unimportant history of the case recited therein it is not practicable to give them in full here. The court decided in favor of the defendants, and the plaintiffs have appealed.

*J. K. Mitchell, and F. T. Burnham, for the appellants.*

*C. H. Nicholas, N. C. Else, and S. N. Hawkes, for the appellees.*



The opinion of the court was delivered by

GRAVES, J.: The first and principal claim made by the plaintiffs is that the forfeiture proceedings were insufficient. The return of the sheriff showing the service of notice omitted to state all that was done by him in making service, and the court permitted his deposition to be read stating more in detail how and where the notices were posted and that no person was upon the premises. The notices were served by him in December, 1895, about thirteen years before this trial. The return of service made by the sheriff reads:

"RETURN. Received this notice this 2d day of December, 1895, and served the same by posting notice, also posting copy on the within-named S. W. S. W. 36-9-13. December 3, 1895.

G. B. RUGGLES, *Sheriff*."

A separate notice was issued for each tract of forty acres in the section, and the returns were alike. The sheriff testified in his deposition, in substance, that he distinctly remembered serving the notices in question; that he was well acquainted with plaintiff Z. T. Walrond, who had been a prominent lawyer in that county for several years, but at that time resided in Oklahoma. He further stated that he went to the land in question at the time of the service and found the same wholly unoccupied and vacant, and he posted and left upon the land a certified copy of the notice received by him from the county clerk, and afterward posted a certified copy thereof in a conspicuous place in the county clerk's office; that he intended so to state in the return, and supposed that what he did state would be so understood.

The plaintiffs insist that the admission of this evidence was erroneous; that it varies and contradicts the written return of the officer, and has the effect to disturb vested rights. It is also contended that its admission can not be justified by chapter 373 of the Laws

of 1907, as that law was intended to operate prospectively only, and does not apply to returns and records which were made before that chapter was enacted. These questions have been already carefully considered by this court and decided adversely to the contention of the appellant. (*Burgess v. Hixon*, 75 Kan. 201; *Jones v. Hickey*, 80 Kan. 109; *Reitler v. Harris*, 80 Kan. 148; *Broadie v. Carson*, 81 Kan. 467.) We do not think that the deposition of the sheriff had the effect of varying or contradicting the officer's return; it merely supplemented it, and made clear what was done in serving the notice. It amounted to no more than an amendment of the return to make it speak the truth.

The plaintiffs complain of permitting the witness to testify from memory to facts occurring thirteen years prior to that time. This objection, however, goes to the weight of the evidence and not to its competency.

It is insisted that the description of the land in the return is unintelligible, being given as "S. W. S. W. 36-9-13," and other similar letters indicating the particular 40-acre tract described in the notice. The rule of law is that any description is sufficient which will enable the land to be located. (1 A. & E. Encycl. of L. 100.) There are a few cases to the contrary, but they are decidedly in the minority. Lands have been described by the use of such abbreviations in this state so generally and for such a length of time that any person having any considerable experience in descriptions is familiar with them and has no trouble in understanding them. It is said, however, that this return does not give the range, whether east or west, nor the county in which the land is located, and therefore the land can not be ascertained, which is true, and it would be difficult perhaps to say with certainty what land was intended by this description alone. The notice, however, upon which the return is written contains an accurate description of the land, and the return refers

to the land as "the within named," so that, taking the notice and return together, no doubt could exist as to the land intended. The county clerk of Osborne county kept in his office a record of school-land sales, and also of forfeitures. When notices were issued to forfeit the lands in question there was written opposite each tract the following: "Notice issued December 2, 1895"; afterward, the following: "Forfeited February 23, 1896." This book was one of the records of his office.

The district court found in favor of the defendants upon the ground that the plaintiffs, with knowledge that the defendants were in possession of the land as owners under what they believed to be a valid purchase from the state, having remained silent for more than ten years without objection or claim of right, were estopped from asserting any rights now. The facts found by the court are very similar to those in the case of *Burgess v. Hixon*, 75 Kan. 201, and probably the court was fully justified in applying the rule of estoppel here as was done there, but we prefer to affirm the case upon a different ground.

We think the law was fully complied with in taking the forfeiture. Doing the things required by statute is what constitutes a valid forfeiture, and not the return of the officer. The return is merely evidence of what the officer did, and when a return is incomplete it may be supplemented and amended by proving what steps were actually taken. The plaintiffs were purchasers of the land in controversy, but by neglect their rights became forfeited. The state, through its proper officers, took the steps required by statute to annul the contract, and sold the land to other purchasers. The land when the forfeiture was taken, was worth \$2 an acre; it is now worth \$15 per acre. The plaintiffs may not under these circumstances insist that they be permitted to carry out their contract of purchase simply for the reason that the sheriff, through ignorance, mistake or

---

Sayers v. Railway Co.

---

oversight, omitted to state clearly in his return all the steps taken by him in serving the notices of forfeiture. The imperfect return of the sheriff did not invalidate the steps taken. The forfeiture was complete.

Other questions are presented, but those discussed dispose of the case and the others need not be considered. The judgment of the district court is affirmed.

---

E. V. SAYERS, *Appellee*, v. THE MISSOURI PACIFIC  
RAILWAY COMPANY, *Appellant*.

No. 16,413.

SYLLABUS BY THE COURT.

1. **PARTIES**—*Action for Injury to Growing Crop by Landlord Who is to Receive Crop Rent.* A landlord who is to receive a share of the crop as rent may maintain an action without joining the tenant and recover from a railway company which obstructed a river, resulting in flooding the land and injuring and destroying part of the crops growing thereon, but can only recover to the extent of his share.
2. **DAMAGES**—*Destruction or Injury to Growing Crop.* The measure of damages for the destruction of a growing crop is the value of the crop in its condition at the time and place it was destroyed, and, if only injured, it is the difference in value before and after the injury.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed March 12, 1910. Reversed.

*B. P. Waggener, and J. M. Challiss, for the appellant.*  
*F. M. Harris, for the appellee.*

The opinion of the court was delivered by

JOHNSTON, C. J.: E. V. Sayers, who owned a farm and a half interest in a crop growing thereon, brought an action against the Missouri Pacific Railway Com-

---

Sayers v. Railway Co.

---

pany to recover damages caused by the alleged negligence of the railway company in obstructing the Marais des Cygnes river and thus throwing the water back on the Sayers farm and destroying part of his crop. The case was tried with a jury, which returned a verdict in favor of Sayers for \$250, and from the judgment rendered thereon the railway company appeals. It appears that in the early part of 1906 the railway company undertook to repair a bridge across the river near Ottawa, and in doing so placed two lines of piles across the river and fastened them together with timbers and braces. In June, 1906, when heavy rains fell, large quantities of drift and debris were carried down the river and lodged against the piles and bridge, thus forming an obstruction which resulted in overflowing Sayers's farm and injuring his crop. The farm adjoined the river, and had been leased to a tenant on condition that Sayers, the landlord, should receive as rental one-half of the wheat and corn grown on the place. The overflow, alleged to have been negligently caused by the railway company, injured the crop of the tenant as well as that of the landlord, but in this action Sayers only asked for the loss which he had sustained. There was testimony tending to show that the water was two or three feet higher above the obstruction made by the piling and bridge than it was below it, and that after the obstruction was washed out by the force of the current the water thrown back on Sayers's farm lowered rapidly. From the testimony it also appeared that on other occasions when the flood water reached the same general level in that region, and there was no piling to obstruct the flow, the water did not back upon and overflow the Sayers farm.

It is contended on this appeal that Sayers was not entitled to any damages; that his tenant was the owner of the crop, and that until the landlord's share was severed and set apart to him he had no such interest in the crop as would warrant him in bringing an action

---

Sayers v. Railway Co.

---

for injury to any part of it. Many authorities are cited to show that, as between the landlord and the tenant, the latter is entitled to the possession of the rented land until the crop is grown and the landlord's share delivered in accordance with the contract of lease, but no question as to the right of possession as between landlord and tenant arises here. Both have an interest in the crop, and are in a sense tenants in common of the crop until a division is made, but each has an ownership which he has a right to protect. (*Dodson v. Covey*, 81 Kan. 320.) The statute defines the kind of interest a landlord has where the rental is a share of the crop grown. It provides that "when any such rent is payable in a share or certain proportion of the crop the lessor shall be deemed the owner of such share or proportion, and may, if the tenant refuse to deliver him such share or proportion, enter upon the land and take possession of the same, or obtain possession thereof by action of replevin." (Gen. Stat. 1868, ch. 55, § 25; Gen. Stat. 1901, § 3869.) This provision gives the landlord an individual ownership in the crop, and for an injury to that interest he can recover without joining the tenant as plaintiff. In *Larkin v. Taylor*, 5 Kan. 433, it was held that a tenant might recover against a wrongdoer for the loss of a crop without making the landlord plaintiff in the proceeding, but it was further held that he could only recover for his own interest. The landlord is likewise limited in his recovery to the damage done to his share, and this he may have without awaiting the coöperation of a tenant, who is not a necessary party in bringing an action against the wrongdoer, and whether he is a proper party it is not necessary to determine. (*Neal v. Ohio River R. Co.*, 47 W. Va. 316; *Texas & Pacific R'y Co. v. F. W. Saunders*, 4 Tex. App. Civ. Cas. 528; *Gulf, C. & S. F. Ry. Co. v. Caldwell* [Tex. Civ. App. 1907], 102 S. W. 461; *Atlanta & B. Air Line Ry. v. Brown* [Ala. 1908], 48 So. 73.)

---

Sayers v. Railway Co.

---

The only other question which appears to have been presented on the motion for a new trial is whether the court applied the proper measure of damages for the injury to, or loss of, the growing crop. The railway company asked for an instruction that if the issues were found for the plaintiff he could only recover one-half of the value of the crop destroyed at the time the damage occurred. Instead of this measure the court instructed that "the plaintiff alleges in his petition that he had rented this land to tenants, and that it was planted in wheat and corn, and he claims that he was to receive as rent for said land one-half of the wheat delivered in Ottawa, and one-half of the corn placed in the cribs on the farm, and that he was to pay one-half of the expenses of thrashing the wheat. If he recovers you should allow him just compensation for his loss. He should recover one-half of the total loss of the wheat, occasioned by the fault of the defendant, as alleged in the petition, and that value should be based upon the fair market value of the wheat in Ottawa at the time of its maturity, less one-half of the expense of thrashing. Likewise, he should recover one-half of the total loss of corn caused by the defendant's fault as alleged in the petition, which value should be ascertained from the fair market value of the corn on the farm at its maturity." This ruling can not be approved. The authorities generally agree that the measure of damages for the destruction of a growing crop is the value of the crop in its condition at the time and place it was destroyed, and where it is injured, but not destroyed, it is the difference in value before and after the injury. The question came before this court in the early case of *Hays v. Crist*, 4 Kan. 350. There a growing crop was injured by trespassing animals, and the plaintiff insisted that he was entitled to the worth of the crop at maturity, but the court held that "the only just rule by which the damages, if any had been done to the crops, could be estimated was to confine the testi-

---

Sayers v. Railway Co.

---

mony to what it [the crop] was [worth] at the time the trespass was committed." (Page 352. See, also, *St. L. & S. F. Rly. Co. v. Ritz*, 33 Kan. 404.)

It is argued that an immature crop is incapable of valuation; that a crop which had been growing but a few weeks is no more than green blades or stalks, which, if then severed, would be of no practical use or value, and that therefore it would be unjust to measure the damages as of the time of the injury. We all know that growing crops are frequently bought and sold and their value at the time is estimated by the contracting parties. Valid chattel mortgages are given on growing crops, under which they may be sold, and they are also subject to sale upon attachment or execution, where they are appraised and their value estimated in their immature condition, and this seems to be done without any particular difficulty. Such a crop has an actual and also a potential existence, and a fair valuation can be made by witnesses of experience who are acquainted with the character of the land on which it is growing, the product derived from such land when properly cultivated, the ordinary course of agriculture and the climatic conditions in the region, the market price of ripened grain or product in the vicinity, when mature, and also how far the crop had progressed toward maturity when injured or destroyed. Consideration may be taken of these and perhaps other conditions in estimating the value of the crop, but these are not measures of value but only evidence to enable a jury to determine the value of the crop at the time and place of the injury and destruction. The owner is entitled to recover the actual loss which he sustained, and it was an immature crop, subject to many contingencies and open to attack by numerous enemies, and not a mature crop, which he lost. While the authorities are generally agreed that the damages must be measured as of the time of the injury and loss, there is some variety of expression as to the methods of reaching that



---

Sayers v. Railway Co.

---

result. Some are to the effect that it is the actual value at the time of the loss, and others that it is the market value of the crop at that time. Some say it is the value of the crop when destroyed, considered in connection with the value of the right which the owner had to mature and gather it; others that a proper criterion is the value when matured, after deducting for future contingencies and the expenses for cultivation and care. Some arrive at the result by taking the difference in the value of the land before and after the injury or loss of the crop, while others have gone to the extent of holding that the rental value of the land for the season is the basis for computing the loss. These authorities are gathered in an elaborate note to *Teller v. Bay & River Dredging Co.*, 12 L. R. A., n. s., 267. (See, also, 6 A. & E. Ann. Cas. 946, 949; 12 A. & E. Ann. Cas. 782.)

As has already been indicated, a liberal rule as to proof of the value at the time and place of the loss should be applied. It was proper in this case to receive evidence of the character of Sayers's land, the kind of crops which it was capable of producing under ordinary conditions, the average yield of wheat and corn crops on that and similar lands in the neighborhood with like treatment and cultivation, the stage of growth the crop was in at the time of the flood, the market value of the wheat and corn in that vicinity about the time of the loss, and any other facts going to show the value of the undeveloped crop. Such proof is received to show the value of the crop as it stood at the time it was injured, and not its probable value when it should mature and be in the granary. There is a contention that the instruction could not in any event have been prejudicial, as the wheat crop had almost reached maturity when it was flooded and injured. The overflow occurred about June 8, and as the wheat was then nearly ripe it is probable that there was but little difference in value between it and a mature crop, but it was still subject

---

Sayers v. Railway Co.

---

to a number of contingencies which might affect its value. For instance, a hailstorm might seriously have injured the crop and greatly reduced its value; heavy rains might have made it impossible to cut and harvest the wheat in season, so that much of it might have been lost; continued wet weather while it was in the shock and before it could have been stacked or thrashed might have caused the wheat to sprout and thus made it of an inferior grade and quality. These are some of the contingencies which a buyer would consider in purchasing a crop in early June, and they show, too, that there is a substantial difference in value between a crop ready for harvest and one already harvested and garnered. However, they are hazards against which insurance may be had and which a man of experience might fairly estimate in measuring the value of the growing crop. The corn was necessarily young and small in the early part of June, when it was injured and destroyed. Much cultivation was necessary to mature it, and there was considerable risk that the crop might be greatly shortened by unfavorable conditions over which the owner had no control. In the instruction no consideration was given to these things, nor were the jury authorized to make any allowance for cultivation or deduction for immaturity. On the other hand, the jury were in effect told that Sayers was entitled to the value of the crop as it would be at maturity, when his actual loss was its value when injured and destroyed.

There appears to be nothing substantial in the other contentions of appellant, but for the error in the instructions the judgment must be reversed and the cause remanded for a new trial.

BENSON, J., not sitting.

BARBARA E. BUTLER, *Appellee*, v. JAMES T. BUTLER,  
*Appellant*.

No. 16,414.

SYLLABUS BY THE COURT.

1. CONTEMPT — *Conveyances Decreed in Divorce Proceeding — Refusal to Execute Warranty Deeds.* Where, in a judgment in a suit for divorce, the husband is ordered to join with the wife, upon her request, in a conveyance of land adjudged to her in a division of the property, he is not obliged to execute a deed containing covenants of warranty on his part, and is not in contempt of court for refusing to do so.
2. ——— *Execution of Conveyances Decreed upon Request — Authority of Person Making Request.* The husband who was so adjudged to execute a conveyance upon the request of the wife is not compelled to execute such instrument until so requested by her, or by some person authorized by her to make such request; and the person who makes the request should state by whose authority he acts, if the husband asks for such information.

Appeal from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed March 12, 1910. Reversed.

STATEMENT.

JAMES T. BUTLER was adjudged guilty of an indirect contempt and appeals from the judgment.

In a suit for divorce by Barbara E. Butler against James T. Butler a judgment was rendered refusing a divorce, but awarding to the wife certain lands belonging to the defendant, and containing the following order:

"It is further ordered, adjudged and decreed that the defendant shall be and is hereby required to join in any conveyance which the plaintiff may request him to execute sufficient to divest her of, or limit her interest in or to, or, in any manner that she may choose to sell, mortgage or encumber, any or all of the real estate so awarded her in this equitable division of the property rights of the plaintiff and the defendant."

---

Butler v. Butler.

---

Mrs. Butler caused two instruments to be made out, which she signed and acknowledged. These instruments were in the general form of warranty deeds, by Barbara E. Butler and James T. Butler, of the land awarded to the wife by the judgment. One purported to convey a part of the land to her son and the other to convey another part to her daughter. The consideration stated in each deed was "\$1 and other good and sufficient considerations." Following the description in each deed was the following:

"This deed is executed upon the express agreement and understanding between the said first and second party that the said first party reserves the right to possession of said premises during her lifetime, also a life lease to said real property, and with the further understanding that if the said grantor, B. E. Butler, desires or requests a reconveyance of the above described real property from the said grantee, her heirs and assigns to the said grantor, B. E. Butler, then and in that event the said grantee agrees to reconvey upon notice from said grantor."

The deeds also contained the ordinary covenants of seizen, against encumbrances, and general warranty, without exception or restriction. After being executed by Mrs. Butler, they were sent by mail to the appellant, then in another town, with a letter as follows:

"You are hereby requested to acknowledge and sign and return them to Formoso, Kan.

(Signed) G. H. BAILEY."

The evidence does not disclose what authority Mr. Bailey had, nor was the appellant informed of his authority or for whom the writer of the letter acted, further than appears from the letter. In a short time after receiving the instruments the appellant returned them by mail, without his signature, to Mrs. Butler. About five months after they had been returned, Mrs. Butler requested her son George (the grantee in one of them) and another person to take them to Mr. Butler

Butler v. Butler.

---

and have them signed. The son sent the deeds by a notary to the appellant for that purpose. The papers being presented for signature, the appellant asked the notary by whose request he was acting, and was told that George (the son) had brought the deeds up and was over in town, but no further information was given, and the appellant refused to sign the papers. Mrs. Butler died a month later.

After the death of Mrs. Butler, George E. Butler filed a petition and an affidavit in the district court, entitled in the divorce action, setting out the judgment and charging the appellant with contempt in refusing to execute conveyances, as required by its terms. The appellant filed a verified answer denying that he had ever been requested by Mrs. Butler or any one authorized by her to execute such conveyances, and disclaiming any intent to violate the judgment or orders of the court. The matter was heard upon the petition and affidavit of George E. Butler, the answer of the appellant, and the evidence.

*G. H. Bailey, and R. W. Turner, for the appellant.*

*W. R. Mitchell, for the appellee.*

The opinion of the court was delivered by

BENSON, J.: A motion is made to dismiss this appeal for want of an abstract. We agree with counsel that the abstract of the appellant is quite insufficient. The petition and affidavit upon which the contempt proceedings were founded, and the answer thereto, are not abstracted. Some of the evidence is set out in the abstract, but more is contained in the brief. The abstract and brief are so intermingled that it is difficult to distinguish between them; but the appellee has properly supplied these omissions by furnishing a counter abstract, and, the case being thus presented, the motion will be denied. The costs of the counter abstract will be taxed against the appellant.

The judgment for contempt can not be sustained. It was shown that Mrs. Butler did not herself request the execution of the instruments, and no one claiming to act by her authority made such request for her. The party who sent the papers by mail did not intimate that he had such authority, and the others who presented the deed in person, when asked by whose authority they were acting, or who requested them to act, did not claim to represent Mrs. Butler. The appellant was entitled to this information before signing the papers.

Another and more serious objection is urged in behalf of the appellant. The instruments presented for his signature contained covenants of warranty. It can not be claimed that the judgment required him to enter into such covenants. He was only required to join in conveyances to divest his wife of whatever title she had received should she so desire, and was not required to make a better title or to become personally liable for any defect or encumbrance. What interest is conveyed, or might be conveyed, by the peculiar instruments signed by the wife need not be considered.

The appellant contends that the court had no jurisdiction of the proceedings because no accusation as provided by the statute was filed. (Laws 1901, ch. 132, § 2; Gen. Stat. 1901, § 1983.) He can not, however, complain of this, since he filed his answer to the petition without objection, treating that as a sufficient charge, thereby waiving a formal accusation.

The judgment is reversed and the cause remanded for further proceedings.

ANGELL MATTHEWSON, *Appellant*, v. LEWIS HEVEL  
*et al.*, *Appellees*.

No. 16,417.

## SYLLABUS BY THE COURT.

1. TAX ROLLS—*Prima Facie Evidence of Ownership*. The tax rolls of a county showing the assessment of land in the name of a person as owner are *prima facie* evidence of ownership by such person in an action to set aside a tax deed of the land issued to him.
2. TAX DEED—*Grantee Part Owner of Lot Sold as One Tract—Redemption of Entire Lot*. Where portions of a city lot belonging to different owners are taxed together and sold for taxes as one tract, a tax deed to one of the owners operates as a redemption of the whole tract.

Appeal from Labette district court; ELMER C. CLARK, judge. Opinion filed March 12, 1910. Affirmed.

A. A. Osgood, and Paul H. Kimball, for the appellant.

A. D. Neale, and E. L. Burton, for appellee John Mayer.

The opinion of the court was delivered by

BURCH, J.: Matthewson conveyed to Hevel the east 40 feet of the west 140 feet of a city lot. Hevel gave Matthewson a purchase-money mortgage on the property conveyed. Matthewson brought suit to foreclose the mortgage, and Hevel defended on the ground that Matthewson had undertaken to convey land which belonged to Mayer. Mayer was made a party and answered. He alleged that he was the owner of the land, that Matthewson's title rested on a tax deed, and that the tax deed was of no effect because based on a sale of the entire 140 feet, the west 100 feet of which Matthewson owned. Judgment creditors of Hevel were made parties and claimed liens. On the trial it ap-

---

Matthewson v. Hevel.

---

peared that the 140 feet were sold for taxes as a single tract, that Matthewson took an assignment of the certificate of sale, and then a tax deed which embraced the whole of the tract sold. The tax roll of the county was introduced in evidence showing that the west 100 feet of the lot were assessed in the name of Matthewson as owner at the time of the assessment and sale. A witness testified that in a conversation with him, Matthewson admitted he was the owner of the west 100 feet of the lot when he took out the tax deed and stated he did not pay the taxes because Mayer had purchased the 40 feet now in controversy. This testimony was not contradicted. It was stipulated that Mayer was the owner of the 40 feet unless the tax deed extinguished his title. Judgment was rendered for Mayer canceling the deed to Hevel and the mortgage to Matthewson, and decreeing that the judgments against Hevel were not liens. Matthewson appeals.

Matthewson's admission of ownership was quite sufficient to conclude him, and the tax rolls showing him to be owner were properly admitted in evidence. The law requires assessors to list all real estate for taxation in the name of the owners, if known, and they may require owners to furnish them true descriptions. As the court said in *Shoup v. C. B. U. P. Rld. Co.*, 24 Kan. 547, 563, assessors are expected to ascertain the names of the owners of lands assessed and to set opposite each tract or lot on the assessment roll the name of the owner. The determination of the fact of ownership and the entry of the finding on the record are steps in the tax proceeding, and will govern in any controversy arising out of the proceeding unless corrected or rebutted in some proper way. Besides this, a tax roll, prepared according to law, is a public record which a person designated thereon as owner may rely upon as affording notice of his ownership to certain purchasers, and is admissible in his favor to show title and right of possession. (15 Cyc. 137.) Reciprocally, the roll is



## Smith v. Railway Co.

*prima facie* evidence against such a person that he is owner as the roll states.

It was Matthewson's duty to pay his taxes. He could not take a valid tax deed of his own land. The attempt to do so merely amounted to a redemption from the tax sale. The sale and the deed being of a single tract as an entirety, the redemption extended to the entire tract. Had he wished to redeem only the part of the lot which belonged to him he should have proceeded under section 127 of the tax law. (Laws 1893, ch. 110, § 2; Gen. Stat. 1901, § 7662.)

The judgment of the district court is affirmed.

D. P. SMITH, *Appellee*, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellant*.

No. 16,418.

SYLLABUS BY THE COURT.

1. MASTER AND SERVANT—*Notice of Defects—Assumption that Master Has Discharged His Obligation.* A railway engineer is not bound to know every defect existing in the ties and rails of the track over which he runs his engine. If the track, ties and rails are in place he has the right to assume that the company has discharged its obligation to keep them in reasonably safe repair.
2. ——— *Assumption of Risk.* In an action by a railway engineer against the company to recover for personal injuries received in the derailment of his engine, caused by defective ties and rails, where the defects had existed for such a length of time that the railway company was bound to have notice of them, and where it was shown that the engineer had no knowledge of the defects and no opportunity of knowing of their existence except such as came to him in operating his engine over the track, *held*, that the risk as to the condition of the roadbed was not one which he assumed.
3. RAILROADS—*Agreement by Employee to Give Notice of Claim for Injuries—Waiver.* In the action mentioned in the preceding paragraph the answer set up as a defense the failure of

82	136
182	256
82	511
82	853

---

Smith v. Railway Co.

---

the plaintiff to give notice in writing of his claim for injuries within thirty days, as provided in the contract of employment. At the trial the plaintiff, without objection, testified that some one from the claim department of the company came to his house three weeks after the accident and took from him a written statement concerning the accident and his injuries. The defendant then introduced in evidence the written statement itself, signed by the plaintiff, stating the time, place, manner and cause of his being injured and the nature and extent of his injuries. *Held*, that the taking of the written statement constituted a waiver by the company of the failure to give the notice.

Appeal from Brown district court; WILLIAM I. STUART, judge. Opinion filed March 12, 1910. Affirmed.

*M. A. Low, and Paul E. Walker*, for the appellant.

*Joseph G. Waters, John C. Waters, and John F. Kerrigan*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: On the evening of June 7, 1907, D. P. Smith, an engineer in the employ of the defendant, was running an engine pulling a freight train from Horton to Topeka. When about five miles from Horton, at the foot of a long, steep grade, and at a tangent of a curve, the engine was derailed and the plaintiff received injuries to recover damages for which he brought this action. The jury returned a verdict in his favor for \$2000, and the defendant appeals.

The engine which the plaintiff was running belonged to the 1600 type or class, very large and heavy. The track where the accident occurred had been constructed for twenty years, and was of sixty-pound rails, somewhat worn. On account of the lightness of the rails a rule of the company limited the speed of engines of this type to fifteen miles an hour. The petition alleged that the derailment was caused by defective ties and rails.

---

Smith v. Railway Co.

---

Among other defenses, the answer set up that the plaintiff was guilty of contributory negligence in running his engine at a high rate of speed, in excess of fifteen miles an hour. The plaintiff testified that he was familiar with the rule limiting the speed and was running fifteen miles an hour. The witnesses for the defendant placed various estimates on the speed of the train, from twenty to forty miles an hour. The derailment and overturning of the engine and the fact that twenty of the freight cars were piled in confusion on the right of way tended strongly to discredit the engineer's testimony, but we can not say as a matter of law that it was physically impossible for this to have resulted with the train running at a speed of fifteen miles. The speed of the train was, under all the evidence, a question for the jury, and as to this fact their verdict must stand.

The jury made a special finding that the negligence of the defendant consisted in having defective ties and rails. Some of the defendant's own witnesses testified that the inside ball of the rail was worn, and that a rail in that condition on a curve is unsafe. Witnesses for the plaintiff testified that there were at least six rotten and defective ties at the place where the derailment occurred. There was therefore some evidence to sustain a finding of the jury to the effect that the derailment was caused by defective ties and rails and that these defects had existed for such a length of time that the defendant was bound to have notice of them.

If the jury believed the plaintiff's testimony that he did not know the condition of the ties and rails it disposes of the defense of assumed risk. (*Railway Co. v. Michaels*, 57 Kan. 474; *Railway Co. v. Bancord*, 66 Kan. 81; *Brinkmeier v. Railway Co.*, 69 Kan. 738.) There are doubtless cases the extreme logic of which would seem to justify holding that an engineer has equal opportunities with the railway company to know every defect existing in the ties and rails in the track over

---

Smith v. Railway Co.

---

which he runs his engine, but in our judgment so to hold is contrary to the weight of reason. The more recent tendency of the courts is against any extension of the doctrine of assumed risk. The present case is obviously different from one where an employee constantly engaged in work in and about a railroad yard is injured by a defect in the tracks the condition of which he is required to know. Thus, in *Clark v. Mo. Pac. Rly. Co.*, 48 Kan. 654, a brakeman was held to have assumed the risk as to the condition of the roadbed where he had equal knowledge with the master of the defects which caused his injury. To the same effect is *Railway Co. v. Click*, 78 Kan. 419. On the other hand, in *St. L., Ft. S. & W. Rld. Co. v. Irwin*, 37 Kan. 701, it was held that the conductor of a train is not required to know all the defects and obstructions that may exist on the road over which he runs. What reason can be suggested why the same rule should not apply to an engineer? It is true that the duties of a conductor require him to remain on the inside of the train, while the duties of an engineer oblige him to keep his eyes on the track; but the engineer's lookout is always ahead to see if the track is clear, and he is not required to examine the condition of the ties and rails. It is sufficient for him to know that they are in place, and if they are he has the right to assume that the company has discharged its obligation to keep them in reasonably safe repair.

When the plaintiff entered the employ of the railway company he executed a written agreement which provided that, if he sustained any personal injury while in the service of the company for which he might make claim for damages, he would within thirty days thereafter give notice in writing to the general or claims attorney, stating the time, place, manner, cause and extent of his injuries and his claim therefor, and that his failure to give such notice should constitute a bar to any suit on account of such injuries. The contract of employment was introduced in evidence by the de-

---

Smith v. Railway Co.

---

defendant, and there was no showing by the plaintiff that he gave any notice of the injury. At the close of the evidence the defendant requested the court to instruct the jury that if they found from the evidence that the plaintiff voluntarily signed the contract and did not give the notice provided therein, and that the railway company had not waived the giving of such notice, their verdict should be for the defendant. The court refused to give this instruction, but gave one in which the jury were told that the contract was not binding on the plaintiff and the fact that he did not comply with the agreement and give such notice constituted no defense to the action.

In our view this raises the only question in the case. Conceding that the provision requiring notice of the claim was a reasonable and lawful one, that the plaintiff was bound thereby and that the instruction given by the court was erroneous, the error must be regarded as wholly immaterial, for the reason that on the trial the defendant introduced evidence showing a waiver by the company of this provision of the contract. The plaintiff himself testified, without objection, that some one from the claim department of the company came to his house three weeks after the injury and took from him a written statement about the wreck. The defendant then introduced in evidence the written statement itself, which states the time, place, manner and cause of his being injured and the nature and extent of his injuries. It is signed by the plaintiff. The only detail in which it fails to comply with the provisions of the contract as to notice is in not stating the amount of his claim for injuries; but, manifestly, this omission would not be sufficient to deprive him of his right to maintain the action. Being in the nature of a forfeiture, the provision must be strictly construed. A similar provision in the contract was involved in *Railway Co. v. Walker*, 79 Kan. 31. The question there arose upon the pleadings, but it was held that the provision may be waived, that no consideration is

---

Smith v. Railway Co.

---

necessary to support a waiver, and that it is not necessary to show facts amounting to a technical estoppel in order to constitute waiver of such a provision. Whether the written statement which the defendant obtained from the plaintiff be regarded as a sufficient compliance with the condition requiring notice to be given or the action of the defendant in taking the statement be considered as a sufficient excuse for the failure of the plaintiff to give the notice is not important. It is well established that the courts will not enforce a forfeiture where the conduct of the other party is sufficient upon which to base a reasonable excuse for the default. (*Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439.) At the top of the statement made to the claim agent there is this pencil memorandum, "Horton, July 24-'07," indicating that the statement was made on that date, which was more than thirty days from the date the injuries were received. The plaintiff, however, testified that he made, and that the agent took, the statement within three weeks after the accident. The majority of the court are of the opinion that since the defendant offered no evidence to the contrary, further than what appeared by the memorandum referred to, there was no question of fact in regard to waiver that should have been submitted to the jury.

The judgment is therefore affirmed.

PORTER, J. (dissenting): I think the instruction requested should have been given, and that it was error for the court to withdraw from the consideration of the jury the contract of employment on the ground that it was not binding on the plaintiff. If the written statement was in fact taken by the claim agent after the expiration of thirty days from the time of the accident there was, of course, no waiver, and the question whether there was such a waiver should have been submitted to the jury. With these exceptions I concur in all that is said in the opinion.

—

MAX VAN HALL *et al.*, Appellants, v. PETER GOERTZ,  
Appellee.

No. 16,421.

SYLLABUS BY THE COURT.

1. COMPROMISE TAX DEED—*Conveyance of Separate Tracts—Consideration for Each Tract.* A tax deed purporting to convey twelve separate tracts was issued upon a compromise of taxes, under the provisions of section 7672 of the General Statutes of 1901 (Laws 1893, ch. 110, § 4). The recitals of the deed showed the amount for which each tract had been bid off by the treasurer for the county, and of the delinquent taxes charged thereon for each of several years afterward. The amount for which the assignment of all the tracts was made was stated in a gross sum, and the amount of subsequent taxes paid was also given in a gross sum. The consideration stated was the aggregate of these sums. The deed had been of record for more than five years at the time the suit was commenced. It is *held*, that the amount for which each tract was sold and conveyed may be ascertained from the face of the deed with sufficient certainty to satisfy the requirements of the statute, and that the deed is not void upon its face.
2. ——— *All Delinquent Taxes Not Compromised.* Paragraph 1 of the syllabus in *Gibson v. Cockrum*, 81 Kan. 772, is followed.
3. ——— *Recitals in Compromise Deed Conveying Separate Tracts.* Other questions are referred to but not decided.

Appeal from Stanton district court; WILLIAM H. THOMPSON, judge. Opinion filed March 12, 1910. Affirmed.

STATEMENT.

ON October 1, 1888, Frank Cessna was the owner of 160 acres of land, the subject of this action. On that day he mortgaged the land to H. B. Buckwalter to secure the payment of a promissory note for \$300, due in five years, with interest to be paid semiannually. On January 16, 1902, a compromise tax deed was issued purporting to convey the land, with eleven other tracts, to John Plummer, for the delinquent taxes of 1893 to

---

Van Hall v. Goertz.

---

1898, inclusive, reciting the payment of the subsequent taxes of 1899 and 1900 by the purchaser. This deed was recorded on the day it was made and possession was taken by the grantee under it. The land was held by him and his grantees until September 2, 1905, when it was conveyed to the defendant, Peter Goertz, by warranty deed. Mr. Goertz at once entered into possession, improved the land, and still holds it, claiming title in fee simple. In the year 1907 the plaintiffs, Van Hall and Hoffman, purchased the note and mortgage for \$12.50. An assignment thereon bore the signature of the mortgagee, but the space for the name of the assignee was left blank. The note also bore the indorsement of the name of the payee. This action was commenced October 2, 1907, to foreclose the mortgage. The petition alleges that nothing has been paid upon it and that the mortgagor has been absent from Kansas since September 11, 1892. Cessna and other defendants, served by publication, made default. The appellee, Goertz, pleaded the tax deed and the conveyances through which he claimed the tax title, and his possession under it. He also pleaded a judgment quieting title in John Plummer, the fifteen years statute of limitations, a defense based upon the laches of the holders of the mortgage lien, and an alleged estoppel arising from such laches. The mortgagee died in 1896. The judgment was for defendant Goertz, and the plaintiffs appeal.

*Thomas A. Scates, and Albert Watkins, for the appellants; Clifford Histed, of counsel.*

*C. M. Enns, George Getty, and E. H. Madison, for the appellee.*

The opinion of the court was delivered by

BENSON, J.: The defense based upon the tax deed will first be considered. It is contended that this deed is void upon its face because it shows that the taxes for the year 1899 were excluded from the compromise or-



der made by the county commissioners and from the consideration paid by the assignee. This objection is met by the opinion of this court in *Gibson v. Cockrum*, 81 Kan. 772, where such a deed with like recitals, which had been of record for more than five years, was held not to be void upon its face.

It is also contended that the deed is void because it fails to state the separate amount for which each tract included in the deed was assigned or conveyed. The deed clearly recites in separate statements the amount of taxes, penalties and costs for the year 1893, for which each tract was bid off by the treasurer for the county at the tax sale of 1894, and also recites in separate statements the amount of taxes charged upon each tract for the years from 1894 to 1898, inclusive. The deed then recites:

“And whereas said land has remained unredeemed for three years and no person has offered to purchase the same for taxes, charges and interest thereon; and whereas the board of county commissioners of said county of Stanton did on the 8th day of January, A. D. 1901, by resolution of that date, entered of record in book 1, at page 442, of the records of said board, permit and authorize the county treasurer of said county to execute, and the county clerk to assign, a tax-sale certificate of and for said land to John Plummer, of the county of Fremont, and state of Colorado, at and for the sum of two hundred and thirty (\$230) dollars, for the taxes of the years 1893, 1894, 1895, 1896, 1897 and 1898, which said sum, to wit, two hundred and thirty (\$230) dollars, was then and there, on the 3d day of July, A. D. 1901, paid to said treasurer by said John Plummer, and thereupon, on the 3d day of July, A. D. 1901, said treasurer executed a tax-sale certificate for said land, and said county clerk duly assigned all the right, title and interest of said county in and to said land to said John Plummer; and whereas the subsequent taxes of the years 1899 and 1900, amounting to the sum of one hundred and forty-six (\$146.18) dollars and eighteen cents, have been paid by the purchaser as provided by law; and whereas more than the period of six months have elapsed since said assignment was made and neither the owner or owners of said prop-

erty, his agents or attorneys has offered to redeem the same:

"Now, therefore, I, A. F. Zink, county clerk of said county, for and in consideration of the sum of three hundred and seventy-six (\$376.18) 18-100 dollars, so paid the treasurer of said county as aforesaid, and in pursuance of said resolution of said board, and by virtue of the statute in such case made and provided, have granted, bargained and sold and by these presents do grant, bargain and sell unto the said John Plummer, his heirs and assigns, the real estate above described."

The statute gives to any purchaser at a tax sale who shall purchase more than one tract the right to have all such tracts included in one deed, "stating the amount of tax, interest and penalty for which each separate tract is sold and conveyed, the sum of which separate amounts shall be the gross or aggregate consideration of the deed." (Laws 1889, ch. 248, § 1; Gen. Stat. 1901, § 7677.) A tax deed of record for more than five years will not be held void for want of such express statements if the amounts for which each tract was sold and conveyed can be determined from all the language used in the deed, and in a proper case this may be determined by proportion if the recitals afford a sufficient basis therefor. (*Kessler v. Polkosky*, 81 Kan. 69.) The amount of the tax liens upon all the tracts, down to and including the year 1898, may be found by adding the amounts for which they were bid off respectively and the taxes afterward charged thereon, stated in the deed. For all these tax liens \$230 was paid, or for each tract the proportionate part of that sum which the lien upon that tract bears to the aggregate amount of the tax liens against all the tracts. The amount of the taxes for the years 1899 and 1900, paid by the purchaser, was \$146.18. The part of this amount paid upon any tract will be presumed to be in the same ratio to that amount that the tax upon the same tract for the year 1898 is to the aggregate amount of taxes upon all the tracts for that year. Applying this

---

Van Hall v. Goertz.

---

method of computation, the amount for which each tract was sold and conveyed may be determined from the recitals in the deed. While the recitals in this deed show that the taxes so paid for the two years, 1899 and 1900, were a little more than twice the taxes of 1898, still there is nothing to indicate that the increase was not uniform upon all the tracts, and it will be presumed that there was such uniformity, applying the rule of liberal interpretation adopted in *Penrose v. Cooper*, 71 Kan. 725. It was there said:

“Where a tax deed has been of record for more than five years it will not be held to be void because of the omission of express recitals required by the statute, if the substance of such omitted recitals can be supplied by inferences fairly to be drawn from statements elsewhere made in the deed, by giving to the language employed a liberal interpretation to that end.” (Syllabus.)

Applying these principles, and following *Kessler v. Polkosky*, 81 Kan. 69, and the cases cited in the opinion in that case, the tax deed is not void upon its face, and must be upheld in favor of the defendant in possession claiming title under it.

It was urged by the appellee in the argument that an assignee of a county upon a compromise of taxes under section 7672 of the General Statutes of 1901 (Laws 1893, ch. 110, § 4) is not a purchaser at a tax sale within the meaning of section 7677 of the General Statutes of 1901 (Laws 1889, ch. 248, § 1); that the reason for the requirement that a statement of the amount for which each tract was sold and conveyed shall be given does not exist in such a case as this, where the amount to be paid is fixed by the county commissioners; and that this statute (§ 7677) does not apply to a compromise deed. Without deciding this question, it is held, under the liberal rule of interpretation referred to, that the deed under consideration does not materially depart from these statutory requirements.

Title under the tax deed being upheld, it is not necessary to consider the defenses based upon the fifteen years statute of limitations, laches and estoppel, and former adjudication.

The judgment is affirmed.

---

HENRY FLIEGE, *Appellee*, v. THE KANSAS CITY WESTERN RAILWAY COMPANY *et al.*, *Appellants*.

No. 16,423.

SYLLABUS BY THE COURT.

1. **JOINT WRONGDOERS—*Injury to Employee—Joint and Several Liability.*** A manufacturing company sold a machine to a railway company, retaining the title thereto until payment was made, and undertook to furnish a competent engineer to superintend the erection and installation of the machine on the railway company's premises; and the railway company undertook to furnish employees to assist in installing and starting the machine. While the work was in progress an employee of the railway company, acting under the direction of the engineer of the manufacturing company, was negligently injured. *Held*, that the manufacturing company and the railway company were engaged in a joint operation and there was imposed on them the joint duty to use due care toward those employed in the work, and as an employee was injured through the omission or negligent performance of that duty the companies were guilty of a joint tort, upon which arose a joint and several liability to the injured employee.
2. **PERSONAL INJURIES — *Contributory Negligence.*** Under the facts in the case it is held that the employee was not guilty of contributory negligence in not adopting another and safer method of performing the task assigned to him.

Appeal from Leavenworth district court; JAMES H. GILLPATRICK, judge. Opinion filed March 12, 1910. Affirmed.

---

Fliege v. Railway Co.

---

*J. E. McFadden, and Lathrop, Morrow, Fox & Moore,* for the appellants; *H. L. Alden,* of counsel.

*Pierre R. Porter, and Herbert W. Wolcott,* for the appellee; *Samuel Maher,* of counsel.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by Henry Fliege against the Kansas City Western Railway Company and the General Electric Company to recover damages for personal injuries alleged to have been negligently inflicted upon him by the two companies. The railway company purchased from the electric company a heavy machine, called a rotary converter, which was to be installed at a station on the railway company's line, and to that end the electric company was to furnish a competent engineer to have charge of the erection and starting of the engine. The electric company sent W. W. Ray to superintend the installation and starting of the machine, and the railway company coöperated in the work and furnished Jeffers, its consulting engineer, Fliege and others of its employees to assist Ray in the work. In the course of installing the machine they were moving a heavy part of it, called the field piece, to its place on a metal bed. Across the metal bed some heavy planks had been placed, upon which the field piece rested while being moved to its place. Ray and Jeffers were on one side of this ponderous machine and Fliege and others upon the opposite side. Jeffers suggested that it was necessary to put another block or wood cushion under the field piece, and Ray directed that it be done. In obedience to the order Fliege procured a scantling and was placing it under the heavy field piece when Ray and Jeffers, who were standing with crowbars on the other side of the machine, without any notice pried the field piece and pushed it over, thereby catching and crushing Fliege's hand before he had time or opportunity to withdraw it.

---

Fliege v. Railway Co.

---

The reckless action of Ray and Jeffers in shoving this heavy machine over on Fliege when he was underneath and in a position of danger, without warning and without reference to whether he had executed the order and withdrawn to a place of safety, was a clear case of culpable negligence on the part of those who had charge of the work.

It is contended by the companies that Fliege was guilty of contributory negligence in failing to adopt a safer method of putting the block under the machine. There is nothing substantial in this contention. Nothing in the machine itself or its position suggested danger to Fliege. He had a right to assume that it would not be moved until the cushion was placed and he had reached a position of safety, and at least would not be moved without giving him notice. It may be that standing on the other side of the machine they could not see just when Fliege had completed the task, but that fact only made the duty to warn Fliege more obligatory. Any method of putting the timber under the machine was safe enough if the ordinary precautions had been taken. The only peril in the case arose from the action of Ray and Jeffers in shoving the machine over upon Fliege while he was under it without giving him warning and an opportunity to protect himself.

After insisting that the injury was not the result of the negligence of either, each of the appellants contends for itself that Fliege was not its servant and if the injury was negligently inflicted it was the negligence of the other appellant. The railway company contends that under the contract the electric company was to furnish a competent engineer to superintend the installation and erection of the machinery, and in effect to set up the machine and turn it over complete to the railway company. It contends further that Ray did not represent the railway company, was not subject to its orders, and that the employees of the railway

---

Fliege v. Railway Co.

---

company were turned over to and were in fact working for the electric company. On the other hand, the electric company insists that Ray was not acting as its employee when Fliege was injured; that he had been merely loaned to the railway company to assist in installing the machinery which that company had purchased, and although he remained the general servant of the electric company and was paid by it he was really serving the railway company in doing the work, and that the railway company must answer for his negligence. The attitude of the companies depended upon the contract made in the sale of the machine and their action under it. Some of its provisions are obscure, but, taken together, and in the light of other evidence as to its execution, they show that the erection and installation of the machine was a joint undertaking and that each was responsible for the negligence of the other. The electric company, which sold the machine and retained the title until payment for it should be made, undertook to furnish a competent engineer and help install the machine. This was done for itself and was more than the mere loaning of an employee to the railway company. It agreed to coöperate in the setting up of the machine. The railway company, which had purchased the machine, undertook, among other things, to furnish its employees, who were to assist the electric company in installing the machine, and these employees were paid by itself. They acted, it is true, under the direction of Ray, but he, it appears, was in fact a common foreman for both companies in installing the machine. Being a joint undertaking, and both companies having coöperated in an act which directly caused an injury to Fliege, they are jointly and severally liable to him.

It has been said to be "well settled that the law will not undertake to apportion consequences between two or more persons jointly guilty of wrongful conduct toward another, though their contributions to the in-

---

Fliege v. Railway Co.

---

jury were in unequal degrees or from different motives." (*Railway Co. v. Durand*, 65 Kan. 380, 383. See, also, *Kansas City v. File*, 60 Kan. 157.) In *Old Times Distillery Co. v. Zehnder*, 21 Ky. Law Rep. 753, 52 S. W. 1051, Hoffman, Ahlers & Co. contracted to make a heater and place it in a distillery. The foreman of the distillery company directed one of its employees to go and assist in lifting the heater to its place, and it appears that the distillery company had agreed to furnish men to assist in putting the heater in the distillery and was to pay certain employees according to the time employed. It was held that the putting of the heater in the distillery was a joint undertaking of the distillery company and the makers of the heater, and that both parties were liable to a servant of the distillery company who assisted in the work and was negligently injured while doing so.

As the appellants in this case were engaged in a joint operation there was a joint duty imposed upon them to use due care toward Fliege while he was under the machine; and as he was injured through the omission or negligent performance of this duty there was a joint tort, upon which arose a joint and several liability against the companies. As tending to support this view, see *American Cotton Co. v. Simmons*, 39 Tex. Civ. App. 189; *Walton, Witten & Graham v. Miller's Adm'r* [Va. 1909], 63 S. E. 458; *Olson v. The Phoenix Mfg. Co.*, 103 Wis. 337; *Consolidated Ice Machine Co. et al. v. Keifer*, 134 Ill. 481; *Cleveland, C., C. & St. L. Ry. Co. v. Gossett* [Ind. 1909], 87 N. E. 723; 4 *Thomp. Com. on the Law of Neg.* § 5003; 6 *Thomp. Com. on the Law of Neg.* § 7435; 1 *Cooley, Torts*, 3d ed., p. 223; 33 *Cyc.* 726.

The case appears to have been fairly submitted to the jury as to the liability of either or both of the companies for the injury of the appellee. Whether Fliege was the servant of one or both companies when injured, and their relation to him, depended not alone upon the



---

Leslie v. Railway Co.

---

contract but also upon the manner in which the contract was executed and the conduct of the companies at the time of the injury. We see no good reason to complain of the instructions, and the objections to rulings on testimony are not deemed to be material.

The judgment of the district court is affirmed.

---

GEORGE M. LESLIE, *Appellee*, v. THE ATCHISON, TOPEKA  
& SANTA FE RAILWAY COMPANY, *Appellant*.

No. 16,424.

SYLLABUS BY THE COURT.

1. **RAILROADS** — *Regulations Imposed upon Shipper to Whom Free Transportation Was Given.* A cattle shipper was given free transportation to accompany his stock, subject to the following restrictions contained in a signed contract:

"We further agree to specially observe the following regulations: (1) Remain in a safe place in the caboose attached to the cars while the train is in motion. (2) Get on and off said caboose only while the same is still or stationary. (3) Will not get on or be on any freight car while switching is being or is to be done at stations or other places or at any other time."

*Held*, the regulations were reasonable and not in contravention of law or sound public policy.

2. — *Duty of Shipper to Comply with Conditions of the Contract.* A cattle shipper using such transportation must regulate his conduct at stopping places by his contract, and hence is obliged to ascertain and know whether he has time to examine his stock and return to his place in the caboose before the train proceeds on its journey.
3. — *Injury to Shipper—Passenger or Licensee—Waiver of Conditions of the Contract.* A cattle shipper using transportation of the character described completed an examination of his stock at a station just as the train commenced to move. The caboose was some twenty cars to the rear. He started to walk toward the caboose, when the conductor told him he had better get on, that the train would be going so fast by the time the caboose got there he could not get on. He then climbed the ladder of a freight car, and before he reached

---

Leslie v. Railway Co.

---

the top was raked off by a water crane overhanging the track. *Held*, the conditions of the contract were waived, that he was not a mere licensee, and that the carrier is liable in damages for the injuries he sustained.

4. ——— *Contributory Negligence of a Passenger.* Under the circumstances of this case it is *held*, that the question whether the shipper referred to was guilty of contributory negligence was one for the jury to decide.

Appeal from Reno district court; PETER J. GALLE, judge. Opinion filed March 12, 1910. Affirmed.

*William R. Smith, O. J. Wood, and Alfred A. Scott,* for the appellant.

*Frank L. Martin, and Warren H. White,* for the appellee.

The opinion of the court was delivered by

BURCH, J.: The plaintiff recovered damages for personal injuries occasioned by the defendant's negligence, and the defendant appeals. The plaintiff shipped a carload of cattle over the defendant's road from Abbyville, Kan., to Kansas City, Mo. He accompanied the cattle, riding on a pass, subject to the following, among other, restrictions contained in a signed contract:

"We further agree to specially observe the following regulations: (1) Remain in a safe place in the caboose attached to the cars while the train is in motion. (2) Get on and off said caboose only while the same is still or stationary. (3) Will not get on or be on any freight car while switching is being or is to be done at stations or other places or at any other time."

When the train reached Strong City the plaintiff alighted to inspect his cattle. Before he could reach the car containing the cattle it had been taken to a distant part of the yards to accomplish some necessary switching. He waited until the car was returned, examined the cattle, and just after he finished the examination observed the train was in motion. He started toward the caboose, which was some twenty cars away.

---

Leslie v. Railway Co.

---

when either the conductor or a brakeman told him he had better get on—that the train would be going so fast by the time the caboose got there he could not get on. His recollection was that it was the conductor who spoke. At this time the train was moving eastward on the main track, and the plaintiff was standing between that track and a passing-track south of it. While waiting for the return of his car of cattle he had been conversing with a friend who was leaving the train at Strong City, and looking eastward he noticed a water crane standing between the two tracks, several car-lengths away. The crane was adjusted to serve engines on either track, and he remembers that, at the time, it was standing “angling to the northwest a little, and about half way between a horizontal.” Immediately after receiving the conductor’s admonition the plaintiff mounted the ladder of a freight car, and when he had ascended far enough that his head and shoulders were above the eaves of the car he stopped and turned partly around to the southwest to say good-by to his friend. At this moment the crane struck him and he was knocked to the ground and severely injured. While the plaintiff was hanging on the side of the car the engineer of an engine on the passing-track, moving up to the crane to take water, saw the plaintiff was giving no heed to the crane and shouted a warning to him.

The jury returned special findings of fact, among which are the following:

“Ques. Did plaintiff climb up on the ladder at the side of the car after the train on the main line started east? Ans. Yes.

“Q. At the time he climbed up on the ladder was there anything to hinder him from seeing the crane between the tracks? A. No.

“Q. Before plaintiff attempted to get on the train was there anything to hinder [him] from seeing the crane between the tracks? A. No.

“Q. How far from the crane was plaintiff at the time he attempted to get on the train? A. Six or eight car-lengths.

"Q. Where was plaintiff standing prior to his attempting to get on the train? A. Between the tracks.

"Q. Who, if anyone, was he talking to at that time? A. No one.

"Q. Did the plaintiff before attempting to get onto the train see the water crane? A. Yes.

"Q. State whether or not plaintiff looked in a southwest direction after he got up on the ladder of the car. A. Yes.

"Q. Which way was plaintiff's face turned at the time the train approached the crane? A. Southwest.

"Q. Was he looking for comrades south and west of him at the time he was struck? A. Yes.

"Q. Was he shouting good-by to his friends at the time the water crane struck him? A. Yes.

"Q. How far from the top of the car was plaintiff at the time he was struck? A. Head and shoulders above the eaves of the car.

"Q. At the time he was struck was he climbing up the side of the car or had he stopped for some purpose? A. Had stopped.

"Q. Was J. H. Shock engineer of the locomotive on the passing-track? A. Yes.

"Q. Did he see plaintiff when he was hanging on at the side of the car? A. Yes.

"Q. Did he see that plaintiff was not looking at the crane between the tracks? A. Yes.

"Q. Did he shout to plaintiff to look out for the crane? A. Yes.

"Q. For what distance did plaintiff hang onto the side of the moving car? A. Six or eight car-lengths.

"Q. Was the main line track eastward perfectly straight at the locality where plaintiff was injured? A. Yes.

"Q. Was the passing-track straight? A. Yes.

"Q. How many car-lengths west of plaintiff was the caboose at the time he attempted to get on? A. About twenty cars.

"Q. Was the caboose at the west end of the east-bound train? A. Yes.

"Q. Did the plaintiff make any attempt to get on the caboose of said train? A. Yes.

"Q. How long was plaintiff talking with his friends before the train pulled out on the main east-bound track? A. About ten minutes.

"Q. Was there anything to prevent plaintiff from

walking down to the caboose before it started? A. Yes.

"Q. If there was any obstruction mention what it was. A. Waiting to look after his stock.

"Q. Did plaintiff ask anybody to stop the train when it was passing? A. No.

"Q. Did the engine which was drawing the train on which plaintiff's cattle were being transported take water at Strong City? A. Yes.

"Q. How long did it take defendant to set out the cars and take water, and get ready to start on with the train, on the main line? A. About twenty minutes.

"Q. If plaintiff had been looking toward the crane between the tracks, would he have seen it before he got to it? A. Yes.

"Q. If he had held his body close to the side of the car would the crane have struck him? A. Yes.

"Q. If he had jumped off the side of the car would the crane have struck him? A. No.

"Q. How fast was the defendant's train going at the time the plaintiff got onto the side of the car? A. Just started."

The defendant claims it owed no duty to the plaintiff except to avoid wanton injury to him, that he assumed the risk, and that he was himself guilty of negligence contributing to his injury. Error is assigned on the giving and refusing of instructions, but in view of the plaintiff's admissions and the findings of fact the matter of instructions is no longer of consequence. The controlling facts are now beyond dispute, and this court can apply the law to them.

The contract was intended to promote the plaintiff's safety, was reasonable in its terms, and did not contravene either the law or sound public policy. Having undertaken to accompany the cattle under the conditions expressed in the contract the plaintiff was bound to observe them. (*Ft. S. W. & W. Rly. Co. v. Sparks*, 55 Kan. 288.)

When the plaintiff undertook to make an inspection of his cattle at Strong City he was bound to order his conduct so that he could comply with the conditions of

---

Leslie v. Railway Co.

---

his pass. He was obliged to ascertain and know whether he had time to examine his cattle and return to his place in the caboose before the train started on its journey. If this were not true the carrier's control over the movements of a stock train would be surrendered to the shippers accompanying it. The plaintiff, therefore, was at fault when he found himself standing on the ground twenty car-lengths from the caboose and the train in motion. At this point, however, the conductor intervened, and the difficult legal question is, What was the effect of the conductor's statement on the rights of the parties?

The case is different from that of *Railroad Co. v. Green*, 60 Kan. 289, in which the trainmen had information that the passenger was riding in a freight car and not in the caboose. There the passenger deliberately took the chances with the knowledge of the peril, and the trainmen simply did not interfere. The case is also different from that of *A. T. & S. F. Rld. Co. v. Lindley*, 42 Kan. 714. There a shipper took a position of danger on top of a car in obedience to a direction of the conductor. The purpose was to assist in giving signals and not to look after stock, and the court held the risk was voluntarily assumed. Here the plaintiff was not called on by the conductor to engage in a foreign enterprise. What the conductor said related to a subject specifically covered by the contract for transportation.

A majority of the court are of the opinion that the conductor, who was in charge of the train and its passengers and was acting for the company, waived the conditions of the pass by telling the plaintiff he had better get on the moving train without waiting for the caboose to come up, that the plaintiff had the rights of a passenger while complying with the conductor's invitation, direction, admonition, or whatever it may be called, and consequently that the defendant was bound to afford the plaintiff an opportunity to reach the ca-

boose without the hazard of being raked off the train by overhanging structures. He was assuming the risk of being left behind by walking toward the approaching caboose. He would not have been on the side of the car except for the conductor. Since the conductor was responsible for his being in an exposed position the defendant was bound to protect him.

The plaintiff's means of observation while he was ascending the ladder on the side of the moving car were limited. His notice of the crane had been incidental. He was obliged to give close attention to the act of climbing. He came in range of the protruding portion of the crane only by the composite movement of climbing and going forward. Granting he was bound to observe his surroundings and to see the crane as he approached it, it was difficult for him to determine whether it actually portended danger until he reached it. Being a passenger, he was not bound to anticipate danger. Whether, on the whole, his conduct was that of a reasonably prudent man was a question for the jury to determine, and the verdict that he was not guilty of contributory negligence is conclusive.

Mr. Justice Porter, Mr. Justice Graves and the writer are of the opinion the contract governed the plaintiff all the time. He was responsible for his predicament and had deprived himself of the right to board the train. The caboose was in motion and he was not at a safe place inside of it. The plaintiff was expecting to catch the moving caboose in violation of his contract. He was walking toward the rear of the train for that purpose. The chances were he would get left and get hurt at the same time. The conductor saw the situation and told him he had better get on where he was because the caboose would be moving too rapidly when it came up. This act of the conductor did not abrogate the written contract and substitute another, changing all the duties and liabilities of the parties. While mounting the ladder of the moving freight car the plaintiff was a mere licensee, volun-

## Duphorne v. Moore.

tarily in a place of danger, just as he would have been had he responded to an invitation of the conductor to come up out of the caboose and ride on top of the train. The defendant owed him no duty except not to injure him wantonly. In any event, when the plaintiff took an unusual way of reaching his proper place on the train he was bound to make diligent use of all his faculties to avoid danger. His pass charged him with notice that it was unsafe to ride anywhere except in the caboose, and he had seen the crane and marked its position. There is no evidence of difficulty experienced in apprehending danger from the crane. The plaintiff did not look at all. He heedlessly chose the rate of speed for his ascent of the ladder, and when he reached the only place where he could be hurt he stopped, turned his back toward the crane and abandoned himself to civilities toward the friend he was leaving. Therefore he was guilty of contributory negligence. However, for the reasons stated, the judgment of the district court is affirmed.

BURCH, PORTER, GRAVES, JJ., dissenting.

MARCEL DUPHORNE, *Appellant*, v. M. L. MOORE,  
*Appellee*.

No. 16,425.

SYLLABUS BY THE COURT.

1. JUDGMENTS—*Validity—Publication Service—Willfully False Affidavit.* A judgment based upon a willfully false affidavit for service by publication is not absolutely void.
2. ——— *Vacation—Fraud—Limitation of Action.* An action to set aside a judgment because it is based upon such an affidavit is one for relief on the ground of fraud, and is required to be brought within two years after the actual or constructive discovery thereof.
3. ——— *Record of Fraudulent Judgment is Notice to a Purchaser.* One who purchases land while the records of the

82	159
82	57



---

Duphorne v. Moore.

---

district court of the county in which it is situated show a judgment annulling the title of the grantor, which is fair on its face but in fact voidable because based on a willfully false affidavit for service by publication, must be deemed to have notice from that time of the perpetration of the fraud.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed March 12, 1910. Affirmed.

*J. G. Campbell, and Ray Campbell, for the appellant.*

*R. L. Holmes, and Charles G. Yankey, for the appellee.*

The opinion of the court was delivered by

MASON, J.: The Walton Loan Company, a Kansas corporation, owned a tract of land in Kearny county. C. H. Puckett, having a tax deed thereto, brought an action in that county to quiet title, making service upon the company by publication, in virtue of an affidavit stating that its officers had departed from the state and could not be found. Judgment was rendered on June 23, 1903, as prayed in the petition. On June 24, 1905, the company executed a deed for the land to Marcel Duphorne. On March 20, 1908, Duphorne began an action in Kearny county against M. L. Moore, who had acquired the interest of Puckett, asking relief against the judgment on the ground that the affidavit for service by publication was not only false, but was made fraudulently and in bad faith. A demurrer to his petition was sustained, and he prosecutes error.

In *Davis v. Land Co.*, 76 Kan. 27, where it was held that a judgment resting upon publication summons could not be vacated on motion after five years merely upon a showing that the affidavit on which it was based was untrue in fact, a distinction was suggested between the situation there presented and that arising where the affidavit was willfully false. The distinction is manifestly sound. (See *Dunlap v. Steere*, 92

---

Duphorne v. Moore.

---

Cal. 344, and the cases cited in a note thereto in 16 L. R. A. 361.) But even a judgment based upon perjured testimony that the defendant can not be personally served is not an absolute nullity. Its condition is not the same as though there had been no service whatever. The false affidavit challenges the attention of the court. The court in effect makes a finding of fact upon the strength of it, and acts upon such finding in rendering judgment. Whatever remedies the defendant may have to redress the wrong done him, he can not safely ignore the record made against him. It binds him until corrected in some proper and timely proceeding.

"Every judgment, whether obtained through fraud or not, is valid and binding and conclusive as to all parties thereto, and their privies, until reversed, vacated, set aside, or perpetually enjoined by some proceeding instituted directly for that purpose. . . . A judgment that merely ought to be nullified is still a judgment." (*Simpson v. Kimberlin*, 12 Kan. 579, 588, 589.)

(See, also, the discussion in *McCormick v. McCormick*, ante, p. 31, and the cases there cited.)

It follows from the principle stated that Duphorne could not maintain an action to quiet his title to the land by removing a cloud cast thereon by the Puckett judgment. He was not entitled to a decree declaring that there had never been such a judgment. All he could rightfully ask was that the judgment should be annulled because it had been procured by imposition practiced upon the court. Viewed in that aspect, his action was one for relief on the ground of fraud and was required to be brought within two years after its discovery. (Civ. Code, § 18, subdiv. 3; Gen. Stat. 1901, § 4446, subdiv. 3.) For the purpose of setting the statute of limitation in operation the fraud is deemed to be discovered whenever it is discoverable by the exercise of the diligence reasonably to be expected of one in the

---

Duphorne v. Moore.

---

position of the person defrauded, under all the circumstances. (25 Cyc. 1186; 19 A. & E. Encycl. of L. 251.) The existence of a public record showing facts disclosing a fraud, the perpetrator of which sustains no fiduciary relation to the victim, is deemed to impute knowledge thereof to anyone who in the exercise of reasonable care for his own protection would be led to examine it. (25 Cyc. 1190; 19 A. & E. Encycl. of L. 251.)

"The language employed in the statute, 'until discovery of the fraud,' does not mean until the party complaining had actual knowledge of the fraud alleged to have been committed, but that constructive notice of the fraud is sufficient to set the statute in motion, even though there is no actual notice; that where the means of discovery lie in public records required by law to be kept, involving the very transaction in hand, and the interests of the parties to the litigation, the public records themselves are sufficient notice of the fraud to set the statute in motion." (*Black v. Black*, 64 Kan. 689, 704.)

"Constructive discovery resulting merely from a statute, under such circumstances that the aggrieved person, although actually diligent, has no reasonable opportunity to learn of the facts constituting the fraud, may not be sufficient to set the statute in operation, but constructive discovery resulting from his failure to be diligent when diligence would have disclosed the fraud practiced upon him will always do so." (*Donaldson v. Jacobitz*, 67 Kan. 244, 247.)

Perhaps the Walton Loan Company, if it had continued to own the land in ignorance of the judgment for more than two years, might have maintained such an action as the present, for, however public the record may have been, no especial occasion arose for its inspection until a change of title took place. But when Duphorne became a purchaser reasonable diligence certainly required him to search such records of the county as affected titles to real estate, including those of the district court. Such an examination would have

---

Lewis v. Barton.

---

revealed the judgment annulling his grantor's title. Knowing of this he must necessarily know either that he was taking nothing by his deed or that the judgment, though fair on its face, had been fraudulently obtained. With such knowledge he must be supposed to have regarded his own title as good and the judgment as invalid. Notice of the record was therefore tantamount to notice of the fraud. By failing to act within two years after being affected with such notice he lost his right to the remedy here invoked.

The judgment is affirmed.

---

J. D. LEWIS, *Appellee*, v. THE BARTON SALT COMPANY,  
*Appellant*.

No. 18,426.

SYLLABUS BY THE COURT.

1. "FACTORY ACT"—*Assumption of Risk—Contributory Negligence*. The "factory act" (Laws 1903, ch. 356) excludes the defense of assumed risk, but does not exclude the defense of contributory negligence.
2. MASTER AND SERVANT—*Injury to Employee—Statutory Duty of Master—Contributory Negligence*. The questions whether it was practicable to safeguard the pans and whether the plaintiff was guilty of contributory negligence presented issues of fact, which were determined by the verdict on conflicting evidence. The verdict was approved by the trial court, and we can not weigh the evidence here.

Appeal from Reno district court; PETER J. GALLE, judge. Opinion filed March 12, 1910. Affirmed.

William Warner, O. H. Dean, W. D. McLeod, H. C. Timmonds, H. M. Langworthy, O. C. Mosman, J. S. Simmons, and A. W. Tyler, for the appellant.

W. G. Fairchild, for the appellee; H. S. Lewis, of counsel.

The opinion of the court was delivered by

SMITH, J.: This action was brought under the factory act (Laws 1903, ch. 356), by Lewis, an employee, to recover damages for personal injuries received by reason of the alleged failure of the employer to safeguard a salt pan upon which, it is conceded, it became necessary for the plaintiff to ascend to adjust the machinery in the course of his employment.

In addition to the allegation that the defendant failed to furnish the salt pans with proper guards and platforms to avoid injury to the employees, the petition alleged that on the night the accident occurred the room containing the salt pans was insufficiently ventilated to carry off the steam, and insufficiently lighted to enable the plaintiff to see and protect himself from the dangers incident to his duties. This matter of ventilation and lighting is pleaded, so the plaintiff claims, as a duty imposed by the factory act, that the pans may be "properly and safely guarded." (Laws 1903, ch. 356, § 4.) The defendant construes this allegation as the assertion of a common-law liability, independent of the statute, and in its answer alleged assumption of risk and contributory negligence. On motion of the plaintiff the court struck out of the answer the defense of assumption of risk, and this ruling is assigned as error.

Whether the alleged lack of ventilation or of light be regarded as a common-law or as a statutory ground of damage is immaterial in this case, as the evidence supports no cause of action on either of these grounds. The situation disclosed by the evidence tends rather to show that it was impracticable so to ventilate the room on the cold night in question as to dispel the steam arising from the five great pans of boiling brine, or to provide any light which would penetrate the steam, than to show the opposite. The error, then, if it was error, was not prejudicial to the defendant.

The case was evidently decided by the court and jury as one arising purely under the factory act. Under that act assumed risk is not a permissible defense. The prime object of the statute is to deter employers from unnecessarily exposing their employees to danger, even where the danger is apparent and where employment is accepted or is continued under such circumstances that the common law imputes knowledge of the danger to the employee and consequently an assumption of the risk. (*Fowler v. Enzenperger*, 77 Kan. 406; *Manufacturing Co. v. Bloom*, 76 Kan. 127.)

The statute does not exclude the defense of contributory negligence. (*Brick Co. v. Stark*, 77 Kan. 648; *Madison v. Clippinger*, 74 Kan. 700.) It devolves upon the defendant, however, to plead and to establish this defense, and whether it is established by the evidence is a question of fact for the jury. The defendant insists that the plaintiff's own testimony shows that he voluntarily undertook to perform the duty imposed upon him in a manner which he knew to be very dangerous, when he also knew that another method was much safer. To a degree the plaintiff's evidence supports this contention. But there was also testimony of the plaintiff and other witnesses that he performed the task in the customary way, and under such evidence it can not be said, as a proposition of law, that the injury was caused by his own want of care, but all these matters are for the consideration of the jury. (See *Cummings v. Railroad Co.*, 68 Kan. 218; *Brick Co. v. Stark*, *supra*; *Railroad Co. v. Morris*, 76 Kan. 836.) "To be unsafe a method must be such that a reasonably prudent man would not, under all the circumstances, adopt it." (*Brinkmeier v. Railway Co.*, 69 Kan. 738, 745.) We conclude that the court did not err in refusing to instruct the jury to return a verdict for the defendant.

No material error is found in the rulings admitting or excluding evidence offered. We think the evi-

---

Lewis v. Barton.

---

dence produced by the plaintiff, considered in the most favorable light to him, as the jury had the right to consider, was sufficient to sustain the finding—necessarily involved in the general verdict—that it was practical to place a small platform over the salt pans to safeguard the employees from just such accidents as befell the plaintiff in this case; that the failure to have such a platform so placed rendered the defendant responsible for the damages sustained; and that his right to recover was not defeated by contributory negligence on his part.

An interesting question, which, it is believed, has not heretofore been presented to this court, is raised by comparing instructions numbered 3 and 4, given by the court. Instruction No. 3 reads:

“I instruct you that to entitle the plaintiff to recover in this action he must establish by a preponderance of the evidence that the defendant failed to have the vats and pans in his salt manufacturing establishment safely guarded, and that it was practicable to have said vats safeguarded as required by the above statute. The plaintiff must further establish by a preponderance of the evidence that the absence of the safeguards complained of was the direct and proximate cause of plaintiff's injury, or directly contributed thereto. If the plaintiff establishes these facts, by a preponderance of the evidence, then the plaintiff would be entitled to recover damages, unless you should further find that the plaintiff was guilty of contributory negligence.”

In instruction No. 4 the court told the jury that the plaintiff could not recover if his own negligence contributed to his injury. The defendant contends that instruction No. 3 is erroneous and confusing, in that it is thereby held liable only if its negligence contributed to the injury, unless the plaintiff's negligence contributed thereto, and that the evidence suggests no contributing cause, unless it be the plaintiff's negligence. It is true negligence as “contributory” only implies a supplemental cause—something else that also contributed to the effect. The ingenious argument can not avail

---

McClelland v. Railway Co.

---

the defendant. If conclusive at all, it is that instruction No. 4 and not No. 3 is erroneous, as the statute expressly provides that it shall be sufficient in the first instance to establish liability to prove that the failure of the employer to comply with the law contributed to the injury. A *prima facie* case, not rebutted, compels a judgment. Proof that the plaintiff was also guilty of negligence which contributed to the injury does not rebut the fact of the employer's failure to comply with the statute. The statute, then, fairly admits of a construction which would exclude contributory negligence as a defense as well as assumed risk, but does not do so expressly, and the courts have presumed that such was not the intent and have permitted the common-law defense. This certainly is not to the prejudice of the defendant.

We find no substantial error in the admission or exclusion of evidence nor in the instructions. The jury determined the facts adversely to the defendant, and the trial court approved thereof. The judgment is affirmed.

---

GEORGE W. MCCLELLAND, *Appellant*, v. THE MISSOURI  
PACIFIC RAILWAY COMPANY, *Appellee*.

No. 16,427.

SYLLABUS BY THE COURT.

PERSONAL INJURIES—*Accidental Injury to One Driving Over Temporary Railway Crossing—Defendant Not Negligent.* The plaintiff was driving along a highway with a load of hay, and came to a railway crossing. The railway company was engaged at the time in repairing its track and roadbed, and had taken up the crossing and raised the rails several inches. The plaintiff stopped his team, got down from the wagon, went to the crossing, and talked with the foreman in charge of the work. The foreman said he would have the crossing ready for him in a few minutes, and the section men, under



---

McClelland v. Railway Co.

---

the direction of the foreman, put back the crossing boards and threw in some dirt. The foreman then said to the plaintiff: "The crossing is ready for you; do you think you can cross?" The plaintiff said he thought he could. In attempting to drive over the temporary crossing the load of hay was overturned and the plaintiff was injured. *Held*, in an action to recover damages, that in using the temporary crossing which had been placed there for his use the plaintiff acted upon his own judgment, with full knowledge of its condition, and that there was no negligence on the part of the railway company which would entitle him to recover.

Appeal from Greenwood district court; GRANVILLE P. AIKMAN, judge. Opinion filed March 12, 1910. Affirmed.

*D. B. Fuller, H. P. Farrelly, and T. R. Evans*, for the appellant.

*J. H. Richards, and C. E. Benton*, for the appellee; *A. B. Miller*, of counsel.

The opinion of the court was delivered by

PORTER, J.: In September, 1906, the defendant was making some repairs and improvements to its roadbed and track across a highway in Greenwood county. In doing the work it became necessary to remove the plank crossing and to raise the rails of the track several inches. After the crossing planks had been removed, and while the section men were engaged in raising and surfacing the track, the plaintiff approached the crossing with a load of hay. When within about fifty feet of the track he stopped his team, got down off the wagon, went to the crossing, and talked with the foreman. The foreman said he would have the crossing ready for him in a few minutes, and the section men, under the direction of the foreman, put back the crossing boards and threw in some dirt. The foreman then said to the plaintiff: "The crossing is ready for you; do you think you can cross?" The plaintiff said he thought he could. The railway crosses this highway running

northeast at an angle of about forty-five degrees, and the plaintiff was traveling north. Just before he started over, one of the section men advised him to drive squarely across, so that the front wheels would strike the rail at the same time. The plaintiff, however, drove straight ahead and the left wheels of the wagon dropped off the rails just as the right wheels mounted them. The jolting of the wagon overturned the load, throwing the plaintiff to the ground, causing the fracture of a bone in the foot and other injuries to the ankle. This action was to recover damages for his injuries. The case was tried before a jury and a verdict rendered in favor of the defendant. A new trial was denied, and the plaintiff brings this appeal.

One complaint is that the instructions as a whole were incomplete and misleading. There were no intricate questions of law involved in the case; the issues were simple; there was no serious conflict in the evidence and nothing to require elaborate instructions. The instructions fairly covered all the questions, and, besides, the plaintiff made no request for any instructions. Particular complaint is made of the eighth instruction, which reads as follows:

"(8) If the plaintiff got off of his wagon upon arriving at the crossing in question and stood by and saw the condition the crossing was in, and saw and knew the manner in which it was fixed, and knew that it was being fixed for him to cross over, and knowing the manner and condition expressed his approval thereof and stated in substance that it was all right, and thereupon drove onto and over the crossing, and was injured in so doing, by reason of the manner in which it had been fixed for him to cross, then and in that case he can not recover."

We think this correctly states the law as applied to the facts. True, as the plaintiff argues, it was the duty of the defendant to maintain and keep its highway crossings in a safe and suitable state of repair, but the rule has no possible bearing on a case of this kind. In order that a railway company may fulfill this obliga-

tion it must have an opportunity to make necessary changes and repairs in its roadbed at public crossings. If the defendant had completed this change in the crossing and had left it in an unsafe condition a different question would arise. That would have been a failure to keep and maintain the crossing in sufficient repair. But here the defendant was engaged in the work of changing its track at a highway; there was no crossing there when the plaintiff drove up, and a temporary one was put in for the purpose of allowing him to cross at that time, if in his judgment he could safely do so.

The case of *City of Horton v. Trompeter*, 53 Kan. 150, and other cases cited in which it was held that it is not necessarily negligent for a person to use a sidewalk or street after he has notice that it is out of repair have no application here. It was not necessarily negligent for the plaintiff to attempt to use this crossing. The evidence shows that another person drove over it safely with a load of hay a few minutes after the plaintiff's attempt and while the crossing was in the same condition. After the section men had fixed it for the plaintiff he determined, with full knowledge of its condition, that he could safely use it and voluntarily made the attempt.

There is a complaint that the instructions failed to define contributory negligence correctly. The law of contributory negligence was not involved to any serious extent. Before he could recover it was necessary for the plaintiff to show that the defendant was guilty of some negligence. Unless it was negligent in some duty it owed to him it would make no difference whether his negligence contributed to the injury or it was caused by an accident. There was no evidence of any negligence on the part of the defendant, and it would not have been error if the court had sustained a demurrer to the evidence or had directed a verdict in favor of the company.

The judgment is affirmed.

HERMAN J. WILBER *et al.*, Appellants, v. CHARLES  
RONNAU *et ux.*, Appellees.

No. 16,430.

SYLLABUS BY THE COURT.

PLEADINGS — *Amendment* — *Departure* — *Limitation of Actions*.

An amended pleading containing a definite statement of facts concerning a material matter, not in conflict with a general averment respecting the same subject contained in the original petition, should not be held to state a new cause of action; it is only an amplification of the facts constituting the one first pleaded.

Appeal from Pottawatomie district court; ROBERT C. HEIZER, judge. Opinion filed March 12, 1910. Reversed.

*John Marshall*, and *E. C. Warfel*, for the appellants.

*Challis & Brookens*, *Crane & Woodburn Brothers*, and *Samuel Barnum*, for the appellees.

The opinion of the court was delivered by

RENSON, J.: This is an appeal from a judgment for the defendants, entered on the pleadings. The plaintiffs, Herman J. Wilber and Frank L. Wilber, conveyed a tract of land to defendant Charles Ronnau, subject to certain mortgages, upon an agreement that the grantee should assume the payment of the mortgages, amounting to over \$11,000, and other debts, amounting to about \$3000. The agreement was dated August 14, 1896, and, among other provisions, it contained the following:

"Should I have any part of said 614 acres unsold when the present mortgage becomes due in 1901, I agree to sell to Herman J. or Frank L. Wilber any part of said land they may desire, at an appraised valuation by three disinterested parties, provided the amount be not less than would make up with the other sales the full amount of my investment, with seven per cent in-

---

Wilber v. Ronnau.

---

terest; and should I sell all of said property by July, 1901, I agree to divide the profits between myself and said Wilbers, after I first receive seven per cent interest on the amount invested in the purchase of said land, and if any part of said property is left unsold at said time I agree the value of the same shall be appraised by three disinterested citizens, and agree to pay Herman J. and Frank L. Wilber one-half the profit, if any, over the full purchase money, with seven per cent on my investment."

The petition in this action was filed February 16, 1904, setting out this agreement and alleging that the land remained unsold on July 1, 1901; that it was then and ever since had been worth \$65 per acre; that the defendants had received in each year since the conveyance in rents and profits from the land more than enough to pay seven per cent interest on their investment; and that the land had increased in value to the amount of \$26,000, one-half of which by the terms of the agreement belonged to the plaintiffs, and which they sought to recover. The petition contained the following averment:

"That the plaintiffs have had said real estate duly appraised, as provided by said contract, and that the said real estate was appraised by said three householders as aforesaid, at and for the price of sixty-five dollars per acre for each acre of said real estate. . . . That they [the plaintiffs] have duly demanded of and from the said defendants a compliance on their part with the terms and conditions of said agreement, and that the said plaintiffs have offered to do all and whatsoever might be required of them in accordance with the terms of said written agreement hereinbefore set out, but that the said defendants have refused to perform their part of said agreement, to these plaintiffs' damage in the sum of \$13,362."

An answer was filed and a reference was ordered. The referee found in favor of the plaintiffs, but his report was set aside, and thereupon an amended petition was filed on June 17, 1907, setting out the same con-

tract and making substantially the same averments, alleging the performance of all the conditions of the agreement by the plaintiffs, and the refusal of performance by the defendants, but alleging further that "on or about October 10, 1903, the plaintiffs demanded of the defendants that they perform and comply with the terms and conditions of the said written agreement, and then and there offered and tendered to the defendants full performance of the said terms and conditions on the part of the plaintiffs, and, at the same time, demanded of the defendants that they join with the plaintiffs in selecting appraisers to appraise the said real estate in accordance with the terms of the said written agreement; but the defendants then and there failed and refused to comply with the said demands, or with either or any of them, and then and there, by said failure and refusal, waived an appraisalment of the said real estate and waived also the provision of the said written agreement respecting an appraisalment."

An answer was filed to this amended petition, but it was withdrawn, and a motion of the defendants for judgment on the pleadings was sustained. The defendants argue in support of this ruling that the cause of action set out in the amended petition was different from the one first pleaded; that the first petition pleaded an appraisalment of the lands, as provided in the agreement, and the amended petition pleaded a waiver of such appraisalment; and that the cause of action accrued July 1, 1901, and was therefore barred by the five-year statute of limitations before the amended petition was filed.

The cause of action arose upon the contract, by the terms of which the plaintiffs' rights in the land, if it should remain unsold on July 1, 1901, were to be determined by appraisalment. The first petition alleged a demand upon the defendants for a compliance with the provisions of the agreement, and an offer of the

plaintiffs to do all that might be required of them in accordance with the agreement. This was sufficient to admit proof of a request for an appraisement, of an offer to join in choosing appraisers, and of a refusal by the defendants to comply. At least, it was sufficient in the absence of a motion to require a more definite statement. These averments are not inconsistent with the statements that the plaintiffs had caused the land to be appraised. This latter allegation should be construed to relate to the action taken by the plaintiffs after the defendants had refused to comply with their request. In the second petition there is a more definite statement of a demand, offer and tender of performance, by averring in direct terms that the plaintiffs requested the defendants to join in selecting appraisers, and the refusal of such request. The further statement that the defendants waived the provisions for appraisement is only a conclusion from the facts alleged that they had refused, upon proper request, to join in the steps necessary to such appraisement. The conclusion definitely alleged in the last petition was fairly inferable from the facts pleaded in the first petition.

We conclude that the averments of the amended petition with respect to the appraisement should be considered an amplification of the matters pleaded in the original petition; that no new cause of action was introduced; and that the plaintiffs' claim was not barred by limitation. (*Bogle v. Gordon*, 39 Kan. 31; *Snider v. Windsor*, 77 Kan. 67; *Railway Co. v. Moffatt*, 60 Kan. 113; 72 Am. St. Rep. 349, note 1.)

In view of another question suggested by the argument, it is proper to say that in the valuation of the land for the purpose of determining the profits to be divided the value on July 1, 1901, should govern, that being the date fixed in the agreement upon which the

---

Kremer v. Schutz.

---

plaintiffs became entitled to have their interest ascertained.

The judgment is reversed and the cause remanded, with instructions to deny the motion and proceed with the cause.

---

ELLEN P. KREMER, *Appellee*, v. WILLIAM SCHUTZ,  
*Appellant*.

No. 16,431.

SYLLABUS BY THE COURT.

**NOTICE—*Lessee of Land—Lis Pendens—Appeal—Action for Rent.*** In a divorce proceeding the wife claimed a certain farm as her separate property, but the district court decided that it belonged to the husband. Upon an appeal the supreme court reversed that judgment and decided that the title to the farm was in the wife, and that the husband never had owned it. After the appeal had been taken the husband leased the land to another and collected the rent for the same. *Held*, in an action by the wife to recover from the tenant for the use of the land: (1) That the tenant was bound to know that an appeal had been taken from the judgment and therefore took his leasehold interest at the risk of a reversal of the judgment. (2) Although no supersedeas bond was given on the appeal the tenant was bound by the result of the appeal.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed March 12, 1910. Affirmed.

*Z. T. Hazen*, and *R. H. Gaw*, for the appellant.

*T. F. Garver*, and *R. D. Garver*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: In this case Mrs. Ellen P. Kremer, the unquestioned owner of a farm, sues William Schutz to recover \$200 for the use of the farm for the term of one year beginning March 1, 1907. Schutz entered into



---

Kremer v. Schutz.

---

a contract with John L. Kremer on September 4, 1906, agreeing to pay him \$165 as rent. John L. Kremer claimed ownership and the right to lease the land because of a judgment rendered by the district court on June 19, 1906, in a divorce proceeding, wherein the land was awarded to him but subjected to a lien in favor of his wife, Ellen P. Kremer. One of the important questions in that litigation was whether the land was the separate property of Ellen P. Kremer, and the judgment being adverse to her contention she took an appeal to the supreme court, and that tribunal, on June 8, 1907, reversed the ruling of the district court, holding that the land was the property of Mrs. Kremer, and directed judgment in her favor. (*Kremer v. Kremer*, 76 Kan. 134.) When she brought this action for the rent Schutz defended on the theory that the judgment of the district court in effect made John L. Kremer the owner, and that he remained the owner with the right to lease and collect rent until the judgment was set aside. He made the further contention that, no supersedeas bond having been given when the appeal was taken, he was not bound to take notice of the appeal. The trial court ruled that Mrs. Kremer was the owner of the property from the beginning, and that the payment of rent to John L. Kremer did not discharge the obligation of Schutz to pay the owner for the use of the farm and constituted no defense to her action for the rent. This decision must be upheld.

The result of the litigation demonstrated that Mrs. Kremer was the owner of the farm during the time it was occupied by Schutz and that John L. Kremer never owned it nor had any right to lease it. The tenant can not have any greater right than his landlord, and as Mr. Kremer had no title to the land he could not invest Schutz with any right to its use, nor could a payment to one not the owner release the tenant from his liability for rent to the real owner. When the divorce proceeding was begun, in which Mrs. Kremer made a

---

Kremer v. Schutz.

---

distinct claim to the land as her separate property, it was *lis pendens* as to one who leased or otherwise acquired a right in the land during the litigation. (Civ. Code, § 81; Gen. Stat. 1901, § 4515; *Wilkinson v. Elliott*, 43 Kan. 590; *Garver v. Graham*, 6 Kan. App. 344.) While the judgment of the district court awarding the land to John L. Kremer was what is termed a final judgment, it was subject to appeal, and an appeal was in fact taken from the judgment before the lease was executed. In contracting for the use of the land on the basis of that judgment Schutz was bound to know that it was subject to appeal and that an appeal had been taken. The litigation had not ended in the rendition of the judgment, and although it may have seemed to Schutz that Mr. Kremer might ultimately win he still took the risk of a reversal and of the final outcome of the litigation. In *Dunnington v. Elston*, 101 Ind. 373, the same rule was announced. Piggott, who had obtained a judgment in an action of ejectment against Elston, leased the land involved to Dunnington after the rendition of the judgment and before an appeal was taken which subsequently resulted in a reversal. Dunnington claimed that he purchased relying on the judgment and with no notice that Elston intended to appeal from it, but the court held that he was conclusively presumed to know that an appeal might be taken within a limited time and he was therefore bound by that knowledge. It was said:

“Dunnington took his title within the time in which by law Elston had the right to appeal, and thereby he took the hazard of the appeal and the reversal of the judgment, and now that the appeal was taken, and the judgment under which he claims is reversed, he can not say he was a purchaser in good faith and invoke the aid of the statute.” (Page 375.)

It is argued that as no supersedeas bond was given there was no *lis pendens* after judgment. The supersedeas bond and resulting stay only operates on the

---

Kremer v. Schutz.

---

enforcement of a judgment by execution. In a case where the effect of a supersedeas bond was in question the court said :

"We are unable to find any language used by the legislature which seems to us to imply that a stay of execution has any other force or effect on the judgment than simply to prevent its enforcement by execution." (*Willard v. Ostrander*, 51 Kan. 481, 489.)

Schutz was not in the attitude of one purchasing at a judicial sale. Such a purchaser may, under the provisions of section 467 of the civil code (Gen. Stat. 1901, § 4913), acquire a good title notwithstanding a subsequent reversal of the judgment under which the sale was made. (*Evans v. Kahr*, 60 Kan. 719.) These provisions, however, afford no protection to one who purchases or leases from a party to the litigation. (*McClung v. Hohl*, 10 Kan. App. 93.) In *Martin v. Abbott*, 72 Neb. 89, the appellant purchased land from the prevailing party in an action for dower while an appeal was pending in a higher court. No supersedeas bond was given and appellant claimed that he had acquired a good title to the land and was not affected by the appeal or its result. The court held that he was a purchaser *pendente lite*, and that the absence of a supersedeas bond did not affect his standing. It was said that the case was quite unlike one where a party had obtained title at a judicial sale under a judgment of a court, but that "when Love bought the premises pending an appeal he took the same with his eyes open; he obtained the title clothed with no greater rights than his grantor, and took the same subject to the contingency of an adverse decision in this court." (Page 91. See, also, *Dunnington v. Elston*, *supra*; *Farmers Bank v. First Nat. Bank*, 30 Ind. App. 520; *Carr v. Cates*, 96 Mo. 271; 21 A. & E. Encycl. of L. 620.) So, here, the tenant accepted a lease from, and paid his money to, Mr. Kremer with his eyes open, knowing that the ownership of the farm was still in litigation

---

Stevens v. Anthony.

---

and that whether he acquired any rights under his lease from Mr. Kremer depended upon the result of the appeal which had been taken when the lease was made. The real owner can not be deprived of compensation for the use of her land because the tenant happened to deal with one who had no title in or right to lease the land.

The judgment of the district court is affirmed.

---

GEORGE B. STEVENS, *Appellant*, v. THE CITY OF  
ANTHONY, *Appellee*.

No. 16,432.

SYLLABUS BY THE COURT.

**MOBS—Destruction of Property—Reputation and Conduct of Plaintiff—Mitigation of Damages.** In an action against a city for damages occasioned by a mob through injury to the person of a saloon keeper and the destruction of his liquors and saloon fixtures and paraphernalia the conduct and reputation of the keeper may be given in evidence in mitigation of the damages to the property.

Appeal from Harper district court; PRESTON B. GILLET, judge. Opinion filed March 12, 1910. Affirmed.

*George E. McMahon*, for the appellant.

*George B. Crooker*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The plaintiff sued the city for damages resulting from personal injuries inflicted upon him by a mob, and for damages resulting from the destruction of his property through the same agency. He recovered a verdict for \$100, but is dissatisfied and appeals.

The answer pleaded, in mitigation of damages, that the property destroyed consisted of saloon fixtures and paraphernalia, intoxicating liquors kept for unlawful purposes, and slot machines used for gambling and the exhibition of obscene pictures; that the plaintiff was a daily violator of law and a fugitive from justice, that he was addicted to the excessive use of intoxicating liquors and for many years had been a stranger to honest toil, and that his place of business was a corrupter of morals and a standing menace to the peace and good order of society.

Evidence was produced at the trial tending to sustain both the petition and the answer. With the general verdict the jury returned special findings of fact, which follow:

"Ques. Do you find that the reputation of George B. Stevens at the time of the destruction of said property was bad? Ans. Yes.

"Q. State the amount, if anything, you allow plaintiff for the personal injury. A. Nothing.

"Q. Do you allow the plaintiff any sum for the destruction of his personal property? If so, state the amount. A. Yes; one hundred dollars.

"Q. State the full value of all the personal property you are allowing for, if any, that was destroyed. A. One thousand dollars.

"Q. Do you mitigate the plaintiff's damages in any sum on account of his reputation and the character of the property, and the use made of the same? If so, what amount. A. Yes; nine hundred dollars."

The principal question is whether the jury had the right to mitigate damages for the destruction of the property because of the reputation and conduct of the plaintiff. The statute governing the case follows:

"SECTION 1. All incorporated cities and towns shall be liable for all damages that may accrue in consequence of the action of mobs within their corporate limits, whether such damages shall be loss of property or injury to life or limb.

"SEC. 2. In all actions under the preceding section, the character, use or manner of occupancy of the prop-

erty lost or destroyed, and the reputation and conduct of the person injured, may be given in evidence in mitigation of damages." (Gen. Stat. 1868, ch. 32; Gen. Stat. 1901, ch. 32.)

This statute is framed on the theory that whatever may have influenced the conduct of the mob may be shown in mitigation of damages. (*Adams v. City of Salina*, 58 Kan. 246.) Therefore, in the last analysis the question becomes one of relevancy. A man might be mobbed because he is the keeper of a notorious den of iniquity. In that event the character and use of his uninjured property might be considered. On the other hand, if the place should be demolished the conduct and reputation of the incorrigible keeper might be taken into account. In other instances person and property might be so unrelated that the character of one could have no mitigating influence in the event of injury to the other. In cases like this one the character and use of the property involve the conduct and character of the man. Property and man characterize each other. Together they tend to induce violent action by infuriated people. It is impossible to attribute the vented rage of a mob to either alone, and if one be injured the character of the other is relevant in mitigation of damages. When the wrath of a mob is visited upon both property and its owner or keeper the cause of action is single, the damage, though provable item by item, is gross, and the inducement, whether lying with the person or the property, or both, may be shown to mitigate whatever damages may result. The plain language of the statute is that the character and use of the property injured *and* the conduct and reputation of the person injured may be shown in mitigation of damages—that is, any damages the mob may cause.

The plaintiff's standing and that of his business were not improved because the city officials countenanced his operations. Doubtless that fact led the citizens to take the suppression of the place into their own

---

McAfee v. Walker.

---

hands. The precise character of the pictures displayed was a collateral matter. The court can not say from the abstract that other claims of error are well founded.

The judgment of the district court is affirmed.

---

H. W. MCAFEE, *Appellee*, v. O. E. WALKER, *Appellant*.

No. 16,489.

SYLLABUS BY THE COURT.

1. **PARTITION FENCES—*Oral Agreement*.** Neither the statute of frauds nor the act relating to partition fences renders unenforceable an oral arrangement by the occupants of adjoining lands that until the agreement is changed by mutual consent or the withdrawal of one of the parties each shall maintain one-half of a division fence.
2. **DAMAGES—*Trespassing Animals*.** Where a bull over a year old escapes from the land of the owner to that of a neighbor, by reason of the failure of the latter to keep up a portion of the division fence in accordance with an agreement between them, no action for the resulting damages can be maintained under the statute (Laws 1872, ch. 194, § 1; Gen. Stat. 1901, § 7380) forbidding owners of such animals to permit them to run at large.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed March 12, 1910. Reversed.

*Robert Stone, J. B. Larimer, and James A. Troutman*, for the appellant.

*T. F. Garver, and R. D. Garver*, for the appellee.

The opinion of the court was delivered by

MASON, J.: H. W. McAfee and O. E. Walker occupied adjoining farms. McAfee claimed that he had sustained losses by reason of the trespass on his premises of bulls over a year old which Walker owned and

---

McAfee v. Walker.

---

permitted to run at large in violation of law. He sued for damages and recovered a judgment, from which Walker appeals.

Walker defended upon the ground, among others, that if his animals did go upon the land of McAfee it was by reason of defects in the portion of a line fence which it was the duty of the latter to keep in good repair, in virtue of a contract between the adjoining owners. In this court the contention is made in behalf of McAfee that no right can be asserted under such a contract because it was not shown to have been in writing. The question so presented is necessarily preliminary and will be first determined. There is a singular diversity of judicial opinion relating to the application of the statute of frauds to agreements for the maintenance of line fences, which can only partially be accounted for by differences in local statutes. (19 Cyc. 471; 68 Am. Dec. 626, 627, note.) The oral agreement considered in *Osborne v. Kimball*, 41 Kan. 187, was specifically stated to be "a permanent one, to continue always" (p. 189), and was conceded not to admit of possible performance within a year. It therefore was held to require written proof. The fencing act (Gen. Stat. 1868, ch. 40, art. 3, § 13; Gen. Stat. 1901, § 3084) provides that adjoining owners may agree for the division of partition fences, and that such agreements when duly recorded shall be binding upon succeeding owners of the land. That provision probably implies that, in order to bind the successors of the parties making it, such a contract, even if not intended to be perpetual, must be in writing. (*De Mers v. Rohan*, 126 Iowa, 488.) But no reason is apparent why adjoining occupants may not orally agree to divide the work of keeping up a line fence as a temporary arrangement, binding until abandoned by mutual consent or until one party or the other withdraws from it (Browne, Stat. Frauds, 5th ed., § 276a), and that seems to have been the character of the understanding



---

McAfee v. Walker.

---

here relied upon. This view does no possible injustice in the present case. An agreement by which McAfee was to keep up the north half of the division fence and Walker the south half was alleged in the answer, admitted in the reply, testified to by both parties, and assumed to be valid in the instructions.

The vital question in the case relates to the only instruction given concerning that agreement. The county commissioners were shown to have made an order under the herd law (Laws 1872, ch. 193, § 1; Gen. Stat. 1901, § 7466) directing that neat cattle should not be allowed to run at large. This point is contested, but upon insufficient grounds. If the fact were otherwise it would not be material, for the statute itself makes the order as to bulls over a year old. (Laws 1872, ch. 194, § 1; Gen. Stat. 1901, § 7380.) Therefore, if Walker permitted his animals to "run at large" within the meaning of the phrase as used in the acts referred to, he was liable for any injury that McAfee suffered in consequence thereof. The jury were instructed in substance that if Walker permitted his animals to be in a pasture not enclosed with a legal fence, or by one that would turn them, and by reason thereof they went upon McAfee's premises, they would be going at large within the meaning of the statutes; that if he did this with knowledge or notice of this condition of the fence, the fact that, after the parties had by agreement divided it, McAfee had failed to maintain his half would be immaterial. This instruction permitted a recovery even for damages occasioned by the failure of McAfee to live up to his agreement regarding the fence, and in that respect we think deprived Walker of an opportunity to make a defense to which he was entitled.

This court has held that where the owner of land adjoining a railroad turns stock into a pasture surrounded by a legal fence on all sides excepting along the right of way, which the company in violation of its duty leaves

open, the animals are not deemed to be running at large. (*Gooding v. A. T. & S. F. Rld. Co.*, 32 Kan. 150.) But under such circumstances it is held that the owner would have failed to "confine" his stock, a distinction being made between the two expressions. (*K. P. Rly. Co. v. Lándis*, 24 Kan. 406.) True, it was said in *St. L. & S. F. Rly. Co. v. Mossman*, 30 Kan. 336, that "the words 'confined' in one act, and 'prohibited from running at large' in the other act, mean substantially the same thing" (p. 341), but this was characterized as a dictum and practically disavowed in *A. T. & S. F. Rld. Co. v. Riggs*, 31 Kan. 622, 630. The difference has since been noted and acted upon, and has recently been made the basis of a decision. (*Railroad Co. v. Jackson*, 70 Kan. 791.) In *Mo. Pac. Rly. Co. v. Shumaker*, 46 Kan. 769, it was said:

"There is nothing in the statute that requires a bull over one year of age to be confined, nor is there anything prescribing the character of restraint to be thrown around such an animal. The statute simply prescribes that such an animal shall not be permitted to run at large." (Page 772.)

Although these decisions were made in railroad right of way cases, the definition they attach to the phrase "running at large" necessarily applies whenever the statute is invoked in behalf of one whose injury has been occasioned by a failure in the performance of his own duty. The common law places the responsibility wholly upon the owner of animals to keep them from his neighbor's premises, and makes him liable for any injury resulting from his failure to do so. The fencing act (Gen. Stat. 1868, ch. 40, art. 1, § 1; Gen. Stat. 1901, § 3071) changes the rule and requires the neighbor to protect himself from such injury up to a certain point by erecting a fence of a fixed power of resistance. The adoption of the herd law in turn eliminates the intervening statute and restores the common law, by canceling that requirement. But whenever the obligation to maintain a barrier is reëstablished, whether by legis-

---

McAfee v. Walker.

---

lation, as in the case of the law requiring a railroad right of way to be fenced, or by contract, as where the owners of adjoining tracts agree that each shall maintain one-half of a line fence, the burden of duty again shifts, and cattle are not deemed to be running at large as to any one whose own fault causes their freedom from restraint.

"The fence law of 1868 (Gen. Stat. 1901, § 3071 *et seq.*) modified the common-law rule of liability for damages done by trespassing animals, and relieved the owner thereof from all liability for damages resulting therefrom, except trespasses committed on lands enclosed with the legal fence described in the act. . . . The herd law of 1872 (Gen. Stat. 1901, § 7466 *et seq.*), where adopted, is a readoption of the common law in this respect as it existed prior to the enactment of the fence law of 1868." (*Railway Co. v. Olden*, 72 Kan. 110, syllabus.)

The liability of the owner to prevent his animals from straying upon his neighbor's premises was the same at common law as under the herd law. He was under a positive duty to keep them up. Yet it is held without dissent that this duty yielded as readily to a counter obligation resulting from a private contract as to one created by statute.

"There can be no doubt that adjoining owners may, by agreement, . . . assume an obligation to maintain sufficient partition fences against each other's cattle, so as to abrogate the common-law rule. . . . Where an owner of land is bound by agreement, prescription, or statute to maintain a fence, through defects in which his neighbor's cattle enter upon his land and do damage, without the fault of the owner of such cattle, he can not recover therefor." (49 Am. Dec. 251, note.)

"Where, by statute, prescription or agreement, adjacent owners are jointly bound to maintain a partition fence, and neither is severally bound to maintain any particular part of it, they are remitted to their common-law obligations, and each must keep his cattle on his own land at his peril, and will be liable for their trespasses upon his neighbor, without regard to the suffi-

ciency or insufficiency of the partition fence. . . . If a partition fence has been divided, either by statute, agreement or prescription, and a particular portion assigned to each of the adjacent proprietors to keep in repair, each is liable for trespasses committed through defects in his own part of the fence by his cattle upon his neighbor's land. . . . Certain it is, that the plaintiff in such a case can not recover for trespasses committed through his own defective portion of the fence, whether the defendant's portion is defective or not. . . . And if both parts of the fence are defective, and it is not shown through which part the trespassing animals entered, there can be no recovery." (68 Am. Dec. 636, 637, note.)

"The owner of land who fails to perform his duty in keeping up his share of a division fence can not recover in trespass for damages done by trespassing animals resulting therefrom." (22 L. R. A. 62, note.)

"One who fails to maintain his portion of a partition fence properly is without redress for injuries occasioned by his neighbor's stock breaking through such portion, as the loss is occasioned by his own negligence." (19 Cyc. 488.)

There is no reason why the rule should be different where the obligation of the cattle owner is defined by statute, and it has in several instances been applied where that was the case. In *Field v. Bogie*, 72 Mo. App. 185, the syllabus reads:

"Where parties build a partition fence and agree that each will keep in repair a different portion thereof, neither can impound the stock of the other escaping onto his premises through his portion of the partition fence by reason of its bad repair; nor are their rights affected by the adoption in the county of the law restraining animals from running at large."

In *Brown v. Sams* [Tenn. 1908], 109 S. W. 513, it was said:

"The plaintiff . . . insists that the defendant is liable for trespass committed by the hogs under [a statute] making it unlawful to allow live stock to run at large. . . . The defendant's hogs were not running at large, but in his field, and escaped upon the

---

McAfee v. Walker.

---

premises of the plaintiff by the failure of the latter to keep up his part of the joint fence. He can not complain of an injury the direct result of his own wrong." (Page 514.)

In *Duffees v. Judd*, 48 Iowa, 256, under a statute providing that partition fences should be maintained under certain circumstances even where a herd law had been adopted locally, the trial court rejected proof of its adoption because the defendant's cattle were not shown to have been running at large. The supreme court said:

"As we have not the evidence before us, we must presume, in favor of the ruling of the court, that the objection which defendant made to the introduction of this testimony did in fact exist, and that there was no evidence tending to show that the cattle were running at large, but that, upon the contrary, the evidence showed that the cattle broke into plaintiff's enclosure from an adjoining enclosure, through the division fence separating plaintiff and said adjoining enclosure. The position of appellant seems to be that cattle are running at large whenever they pass from the enclosure of the owner upon an adjoining enclosure, although they may pass through the portion of a partition fence which belonged to an adjoining owner, and which he had neglected to maintain in repair. . . . We are satisfied that this position of appellant is not correct." (Pages 258, 259.)

The case of *Conway v. Jordan*, 110 Iowa, 462, seems exceptional. There, under a statute providing that "any person may take possession of any . . . bull found at large" (p. 464), it was held that "any person may take up a bull running at large, no matter how he may have escaped from the control of the owner" (p. 465), and that such an animal is deemed to be running at large although he escaped through a pasture fence which it was the distrainer's duty to maintain, if the owner turned him into the pasture with notice that the fence was insufficient to restrain him. This decision may have been influenced by the fact that

---

McAfee v. Walker.

---

another section of the same act (which was held to have no application) specifically provided that the owner of domestic animals should not be liable in damages for injury done by them resulting from the failure of the person suffering the loss to maintain his half of a division fence. The court seems to have construed the statute as showing a purpose to make a distinction in this regard as to male animals. A similar view on the part of the legislature had been evidenced at the time the case was decided (but not when it arose) by an amendment in terms requiring the owners of bulls to "restrain" them. (Iowa Code, 1897, § 2312.)

In order to warrant a recovery by McAfee, either the animals must have entered his land at some place where he was not bound to maintain a fence, or if the entry was made at a point where that duty rested on him it must not have been accomplished by reason of a defect therein due to his negligence. If the kind of barrier the parties had agreed to maintain was insufficient to turn the bulls, Walker was bound to provide some other and effectual means of restraint, and was liable for any injury resulting from his breach of this obligation. Whatever damages McAfee was entitled to were recoverable without invoking the action of the fence viewers. (*Prather v. Reeve*, 23 Kan. 627.)

The pleadings do not specify just how strong a fence the parties agreed to maintain, nor is the evidence more explicit on that point. Perhaps in the absence of any reason to the contrary they may be presumed to have had in mind the standard fixed by law. No reason is apparent, however, why they might not have agreed to build a barrier of a greater or of a less strength than that of a legal fence, or to preserve one already in existence in its then condition. If the kind of fence the contract called for was not sufficient to

---

---

Fee v. Richardson.

---

turn the bulls, the omission to keep it up could not have caused the plaintiff's injury; otherwise it might.

The judgment is reversed and the cause remanded for a new trial.

---

JAMES FEE, JR., *Plaintiff*, v. W. D. RICHARDSON,  
*Defendant*.

No. 16,594.

P. J. CORCORAN, *Plaintiff*, v. WM. BROWN, *Defendant*.

No. 16,595.

SYLLABUS BY THE COURT.

ELECTIONS—"City Officers"—*Marshals of City Courts—Qualified Voters*. The marshals provided for in each division of the city court of Kansas City, Kan., by chapter 193 of the Laws of 1905 are not city officers, and women are not "qualified voters" in the election of such officers.

Original proceeding in quo warranto. Opinion filed March 12, 1910. Judgment for the defendants.

*James F. Getty, F. D. Hutchings, and David F. Carson*, for the plaintiffs.

*Nathan Cree*, for the defendants.

The opinion of the court was delivered by

SMITH, J.: The pleadings in the two cases are practically identical, and what is said herein applies to each case.

The complaint alleges, in substance, the creation of two city courts in the township of Kansas City by chapter 107 of the Laws of 1897, amended by chapter 212 of the Laws of 1903, and the creation of the office of city marshal by chapter 193 of the Laws of 1905; that at the time of the city election in 1909 the plaintiff had all the qualifications for election to the office of

marshal and was a candidate for election to that office at such election, and that, counting all the votes of males and females cast for the office of marshal at such election, the plaintiff had a majority and was duly elected to the office, but if the votes of males only were counted the defendant had a majority and was elected; that on April 7, 1909, the board of county commissioners of Wyandotte county met as a canvassing board, and unlawfully and without right assumed to canvass the votes cast for the office of marshal of the city court of Kansas City, and unlawfully failed and refused to canvass the votes of females for that office and canvassed only the votes of males; that the board unlawfully declared the defendant elected to the office and issued to him a certificate of election; and that thereupon the defendant did unlawfully usurp and intrude himself into the office, and continues unlawfully to hold and usurp the functions thereof and to withhold the office from the plaintiff. The plaintiff prays for judgment that he, and not the defendant, is entitled to the office.

The defendant contends that this court should not exercise jurisdiction in this case. The jurisdiction is expressly conferred by the constitution (art. 3, § 3), and the plaintiffs have substantially complied with the requirements of rule 5 of this court. Hence jurisdiction is assumed.

It is true that the controversy herein could have been settled by an action in mandamus, but the name of the action is of little consequence. The controlling facts as well as the judgment would, as to this case at least, be practically the same by whichever name the action were styled; the difference would be in the form of the remedy. If the action were in mandamus it would be determined by the same questions of law as are now presented to determine whether or not the facts pleaded in the petition entitle the plaintiff to the office, viz., whether at the city election at which the plaintiff



---

Fee v. Richardson.

---

claims to have been elected women were qualified electors to vote for the candidates for the office of marshal of the city courts. There being, therefore, nothing material in the form of the action, we proceed to the decision of the question.

Section 48 of chapter 110 of the General Statutes of 1868 (Gen. Stat. 1901, § 7814) provides:

"No city of more than two thousand inhabitants shall be included within the corporate limits of any township; but each of such cities shall constitute a township for the purpose of electing justices of the peace and constables as provided in this act, and for the exercise of the powers and jurisdiction of such officers, as prescribed by law. In such cities said officers shall be elected at the regular city election."

By chapter 107 of the Laws of 1897 two new courts were created in Kansas City township, to be called the city courts of Kansas City, first district and second district, respectively. By the terms of the act the offices of justices of the peace in the township were made only nominal, as the jurisdiction of such justices was thereby limited to civil cases where the amount claimed does not exceed the sum of one dollar. (*In re Greer*, 58 Kan. 268.) The same jurisdiction, civil and criminal, was conferred on the city courts as justices of the peace have in the state. No change was made in this act as to the executive offices of the city courts, but it was expressly provided that all writs and processes issued by the judges or clerks of such courts should be directed to some constable of the township, to be executed and returned as provided by law in relation to writs and processes issued by justices of the peace.

At the same session chapter 264 of the Laws of 1897 was enacted, providing for one constable in each of the two districts of the township corresponding to the districts of the city courts, and that each constable should be elected by the qualified electors of the district. This arrangement was continued until the enactment of

chapter 193 of the Laws of 1905, which provides, in part:

"SECTION 1. That each division of the city court of Kansas City, Kan., shall have a marshal, whose style of the office shall be 'marshal of the city court of Kansas City,' and one of said marshals shall be elected every two years from the first and one from the second district of said Kansas City township, as bounded and designated by section 4 of chapter 107 of the Laws of 1897.

"SEC. 4. Said marshals shall be residents of the district from which they are elected and shall be elected by the qualified electors of said city. They shall have and exercise all the powers and perform all the duties prescribed by law for constables, and in addition such other duties as may be required [of] them by law. . . . All vacancies in the office of marshal [shall] be filled by appointment of the governor."

By chapter 230 of the Laws of 1887 (Gen. Stat. 1901, § 642) it was provided:

"SECTION 1. That in any election hereafter held in any city of the first, second or third class, for the election of city or school officers, or for the purpose of authorizing the issuance of any bonds for school purposes, the right of any citizen to vote shall not be denied or abridged on account of sex."

In section 14 of chapter 122 of the Laws of 1903 this provision, with one addition, which is here immaterial, was reenacted as a part of the law relating to cities of the first class.

The question, then, for determination is whether the office of marshal of a city court in Kansas City township is or is not a city office. As before said, the city of Kansas City and Kansas City township are coextensive in territory. These marshals receive no compensation from the city as such, but they are required to collect the same fees as constables are authorized to collect for like service and to return the fees to the county treasurer of Wyandotte county, and they receive from the county a stated salary per annum.

Their bailiwick is not limited by the township or city lines, but extends to the boundaries of Wyandotte county, the same as that of constable under the law of the state. Yet they are elected, not at a general, but at a city, election.

In different courts different tests have been applied in determining whether an officer is a federal, state, county, township or municipal officer, but probably the best test is the character of the services he performs or of the duties imposed upon him. (See 12 Cur. Law, 1131; 28 Cyc. 400.) A marshal of a city court owes no duty to the city as such, any more than a justice of the peace of a city does, and it may be said that the judges of the city courts of Kansas City township bear the same relation to the city and county. Their duties extend through the county, the same as do those of justices of the peace and constables by the laws of the state. By this test—the character of service rendered or of the duty imposed by law—the city courts of Kansas City are essentially justice of the peace courts, and the marshals thereof are constables. If so, the question has practically been determined in this state in *The State, ex rel., v. Parry*, 52 Kan. 1, in which it was held:

“The cities of the state of Kansas are ‘townships,’ within the meaning of the constitution and statutes, for the purposes of the election of justices of the peace, and such officers, although elected within a city, are not strictly city officers. Their official duties are not limited to the boundaries of the cities in which they are elected, nor by the provisions of the charters or ordinances of the city in which they reside. Their civil and criminal jurisdiction are coextensive with their counties, except as otherwise provided by law.

“Chapter 230, Laws of 1887, does not confer upon women the right to vote for justices of the peace in the cities of the state. In one sense, such officers are township officers, rather than city officers.” (Syllabus.)

Following that decision, we hold that these marshals are not city officers, and, as said in *The State, ex rel., v.*

---

The State v. Brecount.

---

*Parry*, supra, it follows that chapter 230 of the Laws of 1887 (Gen. Stat. 1901, § 642) and section 14 of chapter 122 of the Laws of 1903 do not confer upon women the right to vote for marshal of a city court at a city election in Kansas City, Kan.

Judgment for the defendants in each case, and for costs.

---

THE STATE OF KANSAS, *Appellee*, v. IRA BRECOUNT,  
*Appellant*.

No. 16,686.

SYLLABUS BY THE COURT.

1. **HOMICIDE—Excusable—Intent with Which the Act Was Done.** Homicide, to be excusable within the provisions of section 1995 of the General Statutes of 1901 (Gen. Stat. 1868, ch. 31, § 10), must have resulted from an act committed with lawful intent. It is not enough that the act is one which under ordinary circumstances would be lawful and is committed by means ordinarily lawful and with the usual and ordinary caution. There must be absence of unlawful intent.
2. **CRIMINAL LAW — Preliminary Examination — Complaint — Coroner's Warrant.** A coroner's warrant for the arrest of a person found guilty by a coroner's jury takes the place of a complaint, and is sufficient authority for the holding of a preliminary examination before an examining magistrate.

Appeal from Cowley district court; CARROLL L. SWARTS, judge. Opinion filed March 12, 1910. Affirmed.

C. W. Roberts, and F. L. Richardson, for the appellant.

Fred S. Jackson, attorney-general, Ed J. Fleming, county attorney, and C. S. Beekman, for the appellee; C. T. Atkinson, of counsel.

The opinion of the court was delivered by

PORTER, J.: Ira Brecount was convicted of manslaughter in the fourth degree and sentenced to serve a term in the penitentiary not exceeding two years. From this judgment he appeals.

The accident upon which the prosecution is based happened in Arkansas City on the first day of July, 1908. The appellant was a substitute fireman in the employ of the fire department of that city. The fire department was called out by a fire alarm, and the appellant, in company with the chief, was making the run in the latter's wagon. The appellant was driving at a gallop through one of the main streets when a collision occurred with a carriage in which Fred Bowers and his wife were riding, and Mrs. Bowers was thrown out, receiving injuries from which she afterward died. The accident occurred at about seven o'clock in the evening, while a band concert was being given from a temporary stand erected in a part of the street. The street was filled with vehicles and a crowd of persons in attendance on the concert. The appellant was off duty from six o'clock in the evening, and at about seven o'clock met Harry Scott, the chief of the department, two or three blocks from where the crowd was gathered. Scott had not been on duty during the day, and was intoxicated. He had been threatening to turn in a false alarm and have the department make a run to see the crowd scatter. C. H. Peek, who was with Scott, was attempting to prevail upon him not to do so and asked the appellant to take charge of Scott and get him home, and warned the appellant not to permit Scott to turn in an alarm because it would result in injuring or killing some one. Brecount replied, in substance, that Scott was chief and had a right to call out the department if he wanted to do so. Soon after this Scott turned in an alarm

from a box on the corner and gave the location of the fire in a block on south "A" street, to reach which would take the fire department through the crowd then surrounding the band stand. After turning in the alarm, Scott and the appellant ran to the fire department building, where the latter hitched the horse to the chief's wagon, and together they drove down the street as fast as the horse could travel. The appellant was driving and Scott was whipping the horse. This occurred several minutes after the alarm had been turned in and after the fire department had made its run, so that by the time the rig driven by the appellant reached the vicinity of the crowd many of the persons who had followed the first fire wagon and had learned that the alarm was a false one were returning in the direction of the band stand. Among them was Fred Bowers, in a carriage with his wife and two other persons. Bowers was on the left-hand, or wrong, side of the street. He saw the danger he was in and attempted to get out of the way, and called out a number of times, warning the appellant not to drive into his rig. The horse which the appellant was driving was whipped until within a short distance from the place where the collision occurred. Immediately after the accident Bowers asked the appellant why he drove into him, and the appellant exclaimed, "G— d— you, we will teach you to keep on your own side of the street."

There was little conflict in the evidence. The appellant's witnesses testified that during the time he was driving down the street he held a tight rein on the horse, that the gong was sounded continuously, and the witnesses saw nothing unusual in the manner in which the run was made.

The principal contention of the appellant is that the homicide was excusable within the definition of section

1995 of the General Statutes of 1901 (Gen. Stat. 1868, ch. 31, § 10), which, so far as applicable here, reads:

“Homicide shall be deemed excusable when committed by accident or misfortune. . . . or in doing any other lawful act by lawful means, with the usual and ordinary caution, and without unlawful intent.”

It is urged that the evidence of the state established that the appellant was engaged in a lawful act by lawful means, with the usual and ordinary caution, and without unlawful intent. In this we are unable to concur. In the argument particular stress is laid upon the fact that the appellant was doing the act in the usual and ordinary manner. It may be conceded that the run was being made in the usual and ordinary manner, so far as the speed of the horse, the ringing of the gong and the keeping of a tight rein on the horse were concerned. And, if there had been an actual alarm or one which required the appellant to make the run, and while making it in good faith the same accident had occurred, the appellant would not have been criminally responsible for the consequences. But in order to bring an act within the protection of the statute something more is required than that it be done with the “usual and ordinary caution.” There must be absence of “unlawful intent.” It is apparent from the evidence that the alarm was turned in, not in good faith for the purpose of making a practice run, but with the avowed purpose of running through the crowd to see the people scatter, and that in the purpose the appellant was *particeps criminis*. There was no lack of evidence indicating the appellant’s state of mind and his disregard of the rights of others. His profane exclamation immediately after the collision to the effect that he would teach Bowers to keep on the right side of the road, and the circumstances under which the alarm was turned in, demonstrate beyond any question that the act was committed with an un-

---

The State v. Brecount.

---

lawful intent, that it was reckless, wanton and wholly inexcusable, the result of a desire to exhibit a little brief authority and to appear spectacular in the eyes of the people. The act of the appellant in driving through the street in the manner he did might have been lawful on a proper occasion, but whether it was lawful in this instance depends upon whether it was done with a lawful intent. It was the intent which made the act unlawful and took it outside the protection of a statute which was not designed to relieve persons from responsibility for criminal recklessness.

There is nothing substantial in the claim that the appellant was denied a preliminary examination. While the statute provides that a written complaint under oath shall be filed with the magistrate before the warrant issues (Crim. Code, § 36), there is another method provided by sections 1768 to 1771, inclusive, of the General Statutes of 1901. (Gen. Stat. 1868, ch. 25, §§ 127-130.) Where there is a verdict of guilty by a coroner's jury it is made the duty of the coroner to issue his warrant, upon which the defendant is arrested and taken before a magistrate for a preliminary examination. It is expressly provided that such warrant shall take the place of a complaint and be sufficient foundation for the proceeding before the justice. (Gen. Stat. 1901, §§ 1770, 1771.) "Such a warrant is of equal authority with one issued by a justice of the peace." (*The State v. Tennison*, 39 Kan. 726, 728.)

There was no error in the admission of testimony nor in the instructions, and the evidence in support of the motion for a new trial was merely cumulative. We are satisfied that the appellant had a fair trial, and the judgment is affirmed.



THE CITY OF GOODLAND, *Plaintiff*, v. JAMES M. NATION,  
*as Auditor of the State of Kansas, Defendant.*

No. 16,700.

SYLLABUS BY THE COURT.

**CITIES—Bonded Indebtedness—Limitation.** Section 1 of chapter 91 of the Laws of 1909 and section 8 of chapter 62 of the Laws of 1909, as to the provisions relating to the amount of bonds thereby authorized to be issued by cities of the second or third class, are construed as one act, and limit the amount of bonds which may be issued to one and one-half per centum of the assessed value of taxable property in the city for the year previous to the issuance of the bonds, except, as provided in chapter 91, such cities may issue bonds in an amount not to exceed the existing floating indebtedness of such city, such bonds to be used in the redemption of the orders, warrants and scrip of such city outstanding May 1, 1909.

Original proceeding in mandamus. Opinion filed March 12, 1910. Peremptory writ granted.

*C. C. Perdieu*, for the plaintiff.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, and *Charles D. Shukers*, special assistant attorney-general, for the defendant.

The opinion of the court was delivered by

SMITH, J.: On the petition of the plaintiff an alternative writ of mandamus was allowed, and in response thereto the defendant filed a motion to quash the writ on the ground that neither the writ nor the petition states facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for. The case is submitted for judgment on the pleadings. Treating the motion as a general demurrer, the facts admitted thereby are, in substance, as follow:

The city of Goodland is a city of the second class, and on the first day of May, 1909, had outstanding a bonded indebtedness of \$20,000 and a floating indebtedness of \$21,000. The assessed valuation of taxable

property in the city in 1908 was \$1,511,929. After May 1, 1909, the city proceeded, in substantial compliance with the statute, to vote, issue and register with the county clerk bonds in the sum of \$21,000 to redeem the orders, warrants and scrip outstanding, and presented the same to the defendant, the auditor of state, for registration. The auditor ruled that the city was entitled to issue additional bonds to the amount of about \$2700 only, under the limitation provided in section 8 of chapter 62 of the Laws of 1909, restricting such issue to one and one-half per centum of the assessed value of all the taxable property within the city as shown by the assessment books of the year previous. He refused to register bonds to any greater amount. This section, which the defendant contends is applicable, reads:

"Section 1, chapter 128 of the Laws of 1907, is hereby amended to read as follows: Section 1. At no time shall the bonded indebtedness of any city of the second class exceed one and one-half per centum of the assessed value of all the taxable property within said city, as shown by the assessment books of the year previous to the one in which a new issue of bonds is proposed to be made; provided, bonds issued to pay the cost of improvement for which a special tax is levied upon the property improved, and bonds issued to pay the cost of improvements of intersections of streets, alleys and avenues and that portion of the street immediately in front of city property, shall not be included in estimating said bonded indebtedness; and provided, further, that nothing in this section shall be construed to prevent the issuing of bonds to refund existing bonded indebtedness; but nothing herein shall affect bonds issued or that may be issued hereafter under and by virtue of chapter 101 of the Laws of 1905."

The foregoing statute took effect March 8, 1909. The plaintiff contends, for reasons which we need not discuss, that the restriction in section 8 is invalid if applicable to this case, and says the issue of the bonds in question is expressly provided for in section 1 of

---

Goodland v. Nation.

---

chapter 91 of the Laws of 1909, which took effect April 1, 1909, and which is the last pronouncement of the law. The portion of section 1 applicable reads:

"The mayor and councilmen of any city of the second or third class are hereby authorized to issue the bonds of such city in an amount not to exceed the existing floating indebtedness of such city, said bonds to be used in the redemption of the outstanding orders, warrants and scrip of such city outstanding May 1, 1909."

The defendant maintains that both acts are valid, and that it must be presumed that chapter 91 was enacted with knowledge of the restriction contained in chapter 62 and that such restriction should be read into the latter act as an exception.

In view of the general policy of the legislature to enable cities to issue bonds and thereby to distribute the payment for necessary improvements through a number of years instead of requiring a levy to pay all in one year, we think it was the purpose of the legislature rather to make the provision in chapter 91 an exception to the restriction in chapter 62. The two acts having been passed by the legislature at the same session, and so nearly at the same time, should as to these provisions be regarded as one act. Thus construed, the issue of bonds in cities of the second and third classes is limited in amount to one and one-half per centum of the assessed value of taxable property in the city for the year preceding that in which the issue is made, except, as provided in chapter 91, that bonds may be issued to the amount of the floating indebtedness of such city, such bonds to be used to pay the orders, warrants and scrip of such city outstanding May 1, 1909.

The peremptory writ is allowed. Judgment against the defendant for costs.

THE ROYAL SALT COMPANY, *Appellant*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ELLSWORTH *et al.*, *Appellees*.

No. 16,777.

SYLLABUS BY THE COURT.

**TAXATION—Injunction—Fraudulent Assessment—Demurrer to Petition.** While the decision of the tax commission in fixing and equalizing the assessment of property is plenary and final when honestly, although erroneously, made, the petition of a taxpayer for an injunction, in which it was alleged that the tax commission had fixed an exorbitant and excessive valuation upon plaintiff's property, one which the commission knew to be grossly excessive, and that it had placed a valuation on plaintiff's property much higher than it had placed on similar property owned by others, stated a good cause of action for equitable relief, and the demurrer thereto should have been overruled.

Appeal from Ellsworth district court; ROLLIN R. REES, judge. Opinion filed March 12, 1910. Reversed.

*Ira E. Lloyd*, and *N. F. Nourse*, for the appellant.

*Dallas Grover*, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: The Royal Salt Company, which is engaged in mining, crushing and refining salt in Ellsworth county, brought this action against the board of county commissioners and the county treasurer of Ellsworth county to enjoin the enforcement and collection of taxes levied upon its salt plant. The plant consists of ground four acres in extent, together with buildings, machinery and improvements erected and placed thereon for crushing and refining the product of the mines. It is alleged in the petition of the salt company that in 1908 the county assessor assessed its property at \$400,000; that an appeal was finally taken from the decision of the local authorities to the tax commission, and upon a hearing that tribunal found "that the actual

value in money of the salt plant of the Royal Salt Company, including everything in the way of property and rights appertaining thereto, is \$260,000." This valuation, it is alleged, is not only excessive, but the tax commission knew it to be grossly excessive when they placed a valuation on the property of the company. It is specifically alleged that the actual value of the property was not more than \$75,000, and that the commissioners well knew that it was not worth more than that sum. It is further stated that appeals from assessments of the plants of other salt companies were pending before the tax commissioners at the same time as the appeal in the present case, and that the decisions in those cases illustrated the arbitrary and illegal action of the commission in the valuation of the property of the appellant. It is averred that the testimony showed beyond dispute that the plant of the Crystal Salt Company was worth more than that of the Royal Salt Company, and yet the former was only assessed at \$92,000. Again, that the plant of the Bevis Rock Salt Company was of a greater value than that of the Royal Salt Company, and yet it was assessed at only \$45,000. Another case was the plant of the Kingman Salt Company, which was equally as valuable as that of the Royal Salt Company and which was only assessed at \$71,360. It is averred that every member of the tax commission knew that each of these plants was of equal or greater value than appellant's property, which was assessed at \$260,000. In another averment of the petition it appears to be conceded by appellant that its property was of the value of \$97,250.67, but it is positively alleged that the tax commission, and each member of it, not only discriminated in favor of other salt companies, but that they knowingly placed a valuation on appellant's property much more than double its actual value.

The case must be determined on the averments of the petition. On the demurrer to that pleading the al-

---

Salt Co. v. Ellsworth County.

---

legations of appellant are to be taken as true. They are to the effect that the tax commission assessed the property of appellant at \$260,000, when the members each knew that it was of less value than \$100,000. This charges a conscious disregard of duty which amounted to a fraud upon appellant. If they assessed another salt plant at \$45,000, knowing that it was of greater value than that of appellant, which was placed at \$260,000, it was an intentional discrimination and a fraud upon appellant, and if the assessment against appellant is excessive it affords good grounds for the interposition of a court of equity. Taxes will not be enjoined merely because they seem to the court to be excessive. The duty and discretion of placing a valuation on property for purposes of taxation is devolved on the assessing officers, and a court may not assume this task merely because its judgment of value differs from that of the officers. Mere error of judgment of the assessing officers is no reason for interference by a court, but a taxpayer is entitled to the honest judgment of the assessing officers. If an assessment is fraudulently made excessive, or if it is arbitrarily or capriciously made and is so out of proportion to the actual value as to give reasonable assurance that the officers could not have been honest in fixing the valuation, courts of equity are justified in enjoining the enforcement of the tax. (*Symns v. Graves*, 65 Kan. 628; *Finney County v. Bullard*, 77 Kan. 349; *Electric Co. v. Jackson County*, 81 Kan. 6.) In this case the pleader did not leave the matter of the honesty of the assessment to inference, but directly charged that the assessment was fraudulently made. It may be, as appellee asserts, that these allegations, so broadly and positively stated, can not be established by proof, and it may be that the principal contention in the court below was as to the theory on which the assessment should have been made, but the averments of the petition, which for the present must be accepted as true, show that the

---

Salt Co. v. Ellsworth County.

---

assessment is both excessive and fraudulent, and hence the appellant is entitled to equitable relief.

In addition to the charge of fraudulent assessment, appellant contends that its property was valued on the wrong theory. The fact that the commission did not obtain the best evidence of value or adopt the best plan in estimating the value of the plant does not entitle appellant to injunction. It must appear that the theory in its practical operation was hurtful to appellant, and that through the arbitrary, capricious and fraudulent action of the taxing officers an unjust assessment was made by which appellant would be required to pay more than its share of the public burdens. It is not enough that the assessment of other salt companies may be proportionately less than its own, or even less than they should have been, for if appellant's assessment is not excessive and it is not required to pay more than its share of the taxes it is not entitled to equitable relief. (*Finney County v. Bullard*, 77 Kan. 349.) Nor are the taxing officers required to value the ground of appellant as if it were ordinary agricultural land. Its value depends largely upon the quantity and quality of the salt deposits under the surface of the land, and is not governed merely by the quantity of salt mined and refined during the preceding year. The tax commission, in fixing and equalizing values, may avail itself of any information it possesses or can obtain that will enable it to make a just estimate of the actual value of the plant, and its decision, although erroneous, is absolute and final when it is fairly and honestly made.

As the petition states a cause of action the demurrer should have been overruled and the case tried on its merits, and for this error the judgment is reversed and the cause remanded for a new trial.

IRA L. MILBURN, *Appellant*, v. A. R. BEATY, *Appellee*.

No. 16,312.

SYLLABUS BY THE COURT.

**TAX DEEDS—Construction—Consideration for Assignment of Certificate.** A tax deed over five years old will not be held void because in undertaking to state the amount for which the tax-sale certificate was assigned it names the sum for which the original sale was made, where it can be ascertained from a liberal construction of other recitals that the assignment was in fact made for a larger amount, equal to the cost of redemption.

Appeal from Morton district court; WILLIAM H. THOMPSON, judge. Opinion denying a petition for a rehearing, filed March 19, 1910. (For original opinion, see *Milburn v. Beaty*, 81 Kan. 696.)

*George D. Rathbun*, for the appellant.

*T. W. Marshall*, *William Easton Hutchison*, and *C. E. Vance*, for the appellee.

The opinion of the court was delivered by

MASON, J.: In a petition for a rehearing the appellant urges that the court has apparently failed to give sufficient consideration to his principal objection to the tax deed here involved, namely, that it shows that the tax-sale certificate was assigned for less than the amount requisite for redemption at the time. It is true that the deed contains a formal recital that the tax-sale certificate was assigned for \$16.17 upon each tract, and this was much less than the amount required to redeem. The deed recites that the assignment was made for a sum equal to the cost of redemption, but in stating the amount in dollars and cents it repeats the figures that had already been given as the original selling price. It also states that subsequent taxes were paid by the purchaser in various amounts, whereas, the certificate and deed having been issued on the same



---

Scott v. Arneal.

---

day, there could have been no subsequent taxes. As the recital regarding subsequent taxes can not be literally true, we interpret it to mean that the charges accruing on account of the taxes for the years named were included in the amount paid by the purchaser for the certificate. We conclude, therefore, that while the deed *recites* that the certificate was assigned for \$16.17 on each tract, it *shows*, when considered as a whole and liberally construed, that in fact the amount paid for the assignment was that stated as the consideration of the deed, or \$78.97 on each tract. In the original opinion a method of computation was suggested by which the amounts stated nominally as subsequent taxes could be reconciled with the total consideration. As these amounts were volunteered, and their precise derivation is not clear, they may be presumed to have been arrived at in any way that will support the deed.

The petition for a rehearing is denied.

---

GAAR SCOTT & CO., *Appellant*, v. A. H. ARNEAL *et ux.*,  
*Appellees*.

No. 16,191.

RESIDENCE — *Evidence — Attachment.* The evidence justified holding that the defendants were residents of the state when an attachment was issued.

Appeal from Rawlins district court; WILLIAM H. PRATT, judge. Opinion filed March 12, 1910. Affirmed.

*Fred Robertson*, for the appellant.

*Dempster Scott*, for the appellees.

*Per Curiam:* This is a proceeding to review an order dissolving an attachment. The order was obtained on the ground that the Arneals were nonresidents of the

---

Scott v. Arneal.

---

state. The district judge decided on written testimony that the Arneals were residents of the state when the order was issued, and therefore dissolved the attachment. The ruling appears to be supported by the testimony. The Arneals owned and occupied a farm in Rawlins county, Kansas. In December, 1906, A. H. Arneal entered government land in Colorado, and in an affidavit declared that the land was taken for actual settlement. In May, 1907, he relinquished that land and made application to enter another tract, and again declared his purpose to establish a residence on the entered land. At that time he took with him from Kansas horses and implements, with which he made some improvements on the Colorado land. In November, 1907, his application for entry of the second tract was rejected, but he took no appeal from the decision. In January, 1908, Arneal, his wife and children went to Colorado, taking with them some stock, implements and household goods, and they remained there until June 3, 1908. On March 7, 1908, the attachment order was issued, on the theory that they were nonresidents. His testimony is that he did contemplate a residence in Colorado when the attempted entries of government land were made, but, failing to get the land, that purpose was abandoned. They state that the trip to Colorado in 1908 was not with the intention of changing their residence to Colorado, but was taken on account of the wife's health and in the hope that she might recover from a cough with which she was afflicted. They further state that no crop was planted in Colorado and during this absence from Kansas they had no idea of giving up their Kansas residence. When they went to Colorado they left at their home in Kansas some household goods, implements, and a large acreage of growing crops. While the residence of these parties is not to be determined from their declarations alone, their acts and conduct lend considerable support to their declared

---

McGee v. McAuliff.

---

intentions, and together they seem to be sufficient to justify the holding that they were residents of the state when the attachment was issued.

The order is affirmed.

---

JOHN S. MCGEE, *Appellee*, v. MAURICE MCAULIFF,  
*Appellant*.

No. 16,281.

1. PLEADINGS—*Motion to Make Definite and Certain*. The denial of a motion to require a petition charging negligence to be made more definite and certain was not error.
2. PRACTICE, DISTRICT COURT—*Instructions*. In an action for negligence the refusal to give a requested instruction was not error, in view of the instructions given.

Appeal from Saline district court; ROLLIN R. REES, judge. Opinion filed March 12, 1910. Affirmed.

*Thomas L. Bond*, for the appellant.

*C. W. Burch*, and *B. I. Litowich*, for the appellee.

*Per Curiam*: The defendant urges two grounds of error upon which he claims the motion for a new trial should have been sustained, and adds the denial of the motion as the third ground of reversal. The first error assigned is the refusal of the court to require the plaintiff more specifically to allege the act or acts of negligence for which he sought to recover. We think the petition is sufficiently specific to inform the defendant of the issue he had to meet. The trial demonstrates that he had witnesses in attendance who testified as to every fact which is claimed should have been more specifically stated. Indeed, the defendant in his brief claims that he disproved every claim of negligence on his part which the evidence produced by the plaintiff tended to establish.

---

Manley v. Railway Co.

---

The second error assigned is that the court refused to give an instruction requested by the defendant to the effect that the plaintiff could not recover unless the jury should find that the defendant's negligence was the proximate cause of the injury. The eighth instruction given by the court conveys the same idea, without using the word "proximate," in words more likely to be understood by the jury. Indeed, this instruction seems to require too much of the plaintiff, to wit, that before the plaintiff could recover it must affirmatively appear from the evidence that he was not guilty of contributory negligence.

The issue was one of fact, and, under instructions too favorable to the defendant rather than otherwise, was determined by the jury upon very conflicting evidence. Their finding for the plaintiff was approved by the court. The judgment is affirmed.

---

F. B. MANLEY, *Appellee*, v. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant*.

No. 16,385.

1. PRACTICE, DISTRICT COURT—*Special Questions*. A claim of error in the refusal to submit certain special questions to the jury not sustained.
2. RAILROADS—*Injury by Fire—Sufficiency of the Evidence to Overthrow Prima Facie Case of Negligence*. In an action for injury by fire the rule applied that when facts are proved which the statute makes *prima facie* evidence of negligence the question whether such *prima facie* case is overthrown by the evidence of the railway company is one of fact.

Appeal from Anderson district court; CHARLES A. SMART, judge. Opinion filed March 12, 1910. Affirmed.

John Madden, and W. W. Brown, for the appellant.  
Noah L. Bowman, for the appellee.

*Per Curiam:* The appellee recovered damages caused by fire in the operation of the appellant's railroad. A reversal of the judgment is asked on three grounds, viz.: (1) The refusal to submit certain questions to the jury; (2) excessive damages awarded through passion and prejudice; and (3) that judgment ought not to have been rendered upon the verdict after evidence had been given tending to overthrow the *prima facie* case made out by proof that the fire was caused by operating the railroad, and of the amount of damages. (Laws 1885, ch. 155, § 1; Gen. Stat. 1901, § 5923.)

The questions refused were:

"If you answer question No. 10 [relative to the operation of the engine and train] in the negative, then state wherein said engine and train were operated carelessly and negligently."

"If you answer question number 14 [relative to appliance] in the negative, then state wherein it was out of repair and defective."

There was no error in refusing to submit these questions, for reasons repeatedly stated by this court. (*Foster v. Turner*, 31 Kan. 58; *Mo. Pac. Rly. Co. v. Reynolds*, 31 Kan. 132; *L. & W. Rly. Co. v. Hawk*, 39 Kan. 638; *S. K. Rly. Co. v. Walsh*, 45 Kan. 653; *Brick Co. v. Shanks*, 69 Kan. 306.)

The damages allowed were within the evidence, and no passion or prejudice is shown.

The principal reliance of the appellant is upon the third ground, and an elaborate argument has been made asking this court to reconsider the rule declared in *Railway Co. v. Geiser*, 68 Kan. 281, and to apply a different rule in this case. We have carefully considered the argument, and adhere to the decision that when the facts are proved which are by the statute made *prima facie* evidence of negligence the question whether such *prima facie* case is overthrown by evi-

---

Barbour v. Rosedale.

---

dence of the railway company is one of fact for the jury, as stated in paragraph 1 of the syllabus in that case.

It should be observed, however, that although the appellant offered testimony that the front end of the engine and the spark arrester had been duly inspected and were in good order, it offered no evidence that the ash pan, grates and fire box had been recently inspected, or that they were in good condition, and its witness testified that fire "might drop from the ash pan." Besides, there was some evidence that the baffle plate, a part of the spark-arresting apparatus, was not set at the approved standard angle.

The judgment is affirmed.

---

LINIA BARBOUR, *Appellee*, v. THE CITY OF ROSEDALE,  
*Appellant*.

No. 16,402.

1. **PERSONAL INJURIES—*Permanency—Construction of Pleadings.***  
An allegation in a petition that the plaintiff did not believe she would ever recover from her injuries held equivalent to saying that the injuries were permanent.
2. ——— ***Permanent Injuries—Evidence—Presumption on Review.*** It was held that where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries.

Appeal from Wyandotte court of common pleas;  
RICHARD J. HIGGINS, judge. Opinion filed March 12,  
1910. Affirmed.

S. R. Williamson, and Theophilus L. Carns, for the  
appellant.

Philip Erhardt, for the appellee.

*Per Curiam:* The statement in the petition that the plaintiff did not believe she would ever recover from her injuries was equivalent to saying that the injuries

were permanent. It was a question for the jury whether the injuries described would be lasting. To the mind of the court, as it reads the record, it seems quite doubtful whether an inference of permanency could be drawn. Concede that it could not legitimately be done: it does not follow that the defendant was prejudiced by the instruction authorizing the jury to allow for permanent injuries if any such were proved. The natural and logical conclusion is the jury did not allow for anything unproved. It devolves upon the defendant to make the contrary appear affirmatively. The case was one for substantial damages. Pain and suffering were involved, and the jury was the judge of what sum would be adequate compensation. The verdict is small enough that the court would not set it aside if damages for permanent injuries had been expressly excluded. The defendant can point to nothing else to show that its substantial rights were infringed.

The petition referred to other internal injuries than those specified. The defendant itself opened the door to proof of such injuries. One of its expert witnesses, who was very uncandid on cross-examination, nevertheless admitted that the plaintiff's maladies would be aggravated by her fall. The court instructed the jury that it should allow compensation for physical pain and mental suffering resulting from the injuries complained of. Plainly the conditions which the defendant's witnesses disclosed were open to consideration by the jury.

The court instructed the jury on the right theory. The instructions refused were framed on the wrong theory. So far as the record shows the jury properly discharged its function, and the judgment is affirmed.

BEN A. WOOD *et al.*, Appellants, v. W. J. CROSS,  
Appellee.

No. 18,406.

TAX DEEDS — *Compromise — Authority for Assignment — "No Person Bid."* A finding that a five-year-old compromise tax deed was valid sustained.

Appeal from Stanton district court; WILLIAM H. THOMPSON, judge. Opinion filed March 12, 1910. Affirmed.

*George D. Rathbun*, for the appellants.

*Frank L. Martin*, for the appellee.

*Per Curiam*: The trial court held a tax deed of the defendant valid. The plaintiffs appeal. It was a compromise tax deed more than five years old. The first objection to its validity is ruled by the recent case of *Gibson v. Cockrum*, 81 Kan. 772, where it was held, upon a similar state of facts, that it will be presumed that the purchaser was required to pay the delinquent taxes for the other years as a condition precedent to the compromise, and that they were paid when the certificate issued. The second objection is that there was no authority for the assignment because the order of the board was made on January 8, 1901, and the assignment was not actually made or the money paid until June 9, 1901. This point has likewise been determined adversely to plaintiffs. (*Douglass v. Wilson*, 31 Kan. 565, 568.)

We are satisfied with the decision in *Baughman v. Harvey*, 76 Kan. 767, holding that in a deed of this kind the words "no person bid" mean the same thing as the words "said property could not be sold." This disposes of the remaining contention.

The judgment is affirmed.



---

Putnam v. King.

---

THE PUTNAM INVESTMENT COMPANY, *Appellant*, v.  
H. C. KING, *Appellee*.

No. 16,416.

AGENT'S COMMISSION—*Demurrer to the Evidence*. The evidence examined and held sufficient to make a *prima facie* case in favor of the plaintiff in an action to recover a real-estate broker's commission.

Appeal from Pottawatomie district court; ROBERT C. HEIZER, judge. Opinion filed March 12, 1910. Reversed.

C. W. Burch, and B. I. Litowich, for the appellant.

W. F. Challis, and E. C. Brookens, for the appellee.

*Per Curiam*: The Putnam Investment Company, a corporation engaged in the real-estate brokerage business, sued H. C. King for a commission. A demurrer to its evidence was sustained, and it appeals.

Evidence was introduced tending to show these facts: King owned 2720 acres of land, which he used in connection with a quarter section of government land, on which his son had a filing. He "listed" the land for sale with the company, agreeing to allow as a commission all the 2720 acres brought over \$8000, and to deliver possession of the extra quarter section, with whatever interest he might have therein. The company found a buyer who was able and willing to take the property at \$10,080. It undertook to enter into a written contract with him for a sale at that price. This contract was void because beyond the agent's authority, but the buyer, on learning that fact, expressed his willingness to take the property on the terms proposed by the owner. The agent communicated the offer to the owner in writing, describing the property as the 2880-acre ranch. The owner replied professing not to know what land was meant. The agent wrote describing it in full, and explaining that

---

Putnam v. King.

---

the variance in acreage was due to the inclusion of the quarter section of government land, of which a slightly erroneous description was given. The owner responded to the effect that, having been misled by the reference to a 2880-acre tract, he had given an option on the property, which had since expired; that he was still willing to sell, but would not pay the taxes of the current year, which had then accrued. Shortly afterward he dropped the negotiations and never offered to make a conveyance.

Evidence that had been given of the conversation between the representatives of the company and the buyer, leading up to the signing of the contract between them, was stricken out on the ground that the writing alone must determine the condition of the negotiations at that time. The written agreement was abandoned on both sides and a final understanding was reached later. Any evidence was pertinent that tended to show what this was.

The defendant makes five contentions in support of the ruling on the demurrer, which will be stated and discussed in order.

(1) The written contract between the company and the buyer was void under the statute of frauds. This is true, but not important, because the contract was not relied upon in any way by the plaintiff.

(2) This written contract was the best evidence of the agreement made between the company and the buyer, and showed that the agent had attempted to impose unwarranted conditions on the owner. The answer to this is that after the written contract had been wholly abandoned a new understanding was reached, under which all the objectionable requirements were withdrawn.

(3) The verbal agreement between the plaintiff and the defendant set out in the petition was a mere conversation, and was superseded by letters, which constituted the real contract. The conversation, however,

---

Gunning v. Wyandotte County.

---

resulted in a valid contract, which the letters merely confirmed.

(4) The defendant had otherwise disposed of the land before the sale was negotiated by the plaintiff. He did testify to this effect, although he seems to have modified his statement when his attention was called to its apparent inconsistency with his letters. But however positive his testimony may have been in this regard, it could not be conclusive upon the plaintiff. Its credibility, as well as its interpretation, was a matter for the consideration of the jury.

(5) The sale negotiated by the plaintiff was not in accordance with the terms proposed by the owner, in that it included the tract of government land to which he had no title. The evidence was explicit that the buyer did not demand or expect a conveyance of this quarter, unless the defendant owned it.

The judgment is reversed and the cause remanded for further proceedings.

---

AGNES J. GUNNING, as *Executrix, etc.*, Appellant, v.  
THE BOARD OF COUNTY COMMISSIONERS OF THE  
COUNTY OF WYANDOTTE, Appellee.

No. 16,817.

H. A. MENDENHALL, Appellant, v. THE BOARD OF  
COUNTY COMMISSIONERS OF THE COUNTY OF WYAN-  
DOTTE, Appellee.

No. 16,818.

Appeal from Wyandotte court of common pleas;  
LEWIS C. TRUE, judge. Opinion denying a petition for  
a rehearing filed March 22, 1910. (For original opinion,  
see *Gunning v. Wyandotte County*, 81 Kan. 708.)

*William Needles*, for the appellants.

*Joseph Taggart*, county attorney, for the appellee;  
*Nathan Cree*, of counsel.

The opinion of the court was delivered by

BENSON, J.: On a petition of the plaintiff for a rehearing it is insisted that there was manifest error in disallowing items of fees claimed in the extradition proceedings. The agreed statement recited that the officer had traveled 434 miles, had been absent from the county on such service five days, and that he had paid out \$1 for fees in Missouri. The statute provides for compensation in such cases, as follows:

"For serving under requisition made by the governor, five dollars per day and necessary transportation and board actually paid out for himself and prisoner." (Laws 1899, ch. 141, § 1; Gen. Stat. 1901, § 3031.)

No provision is made for mileage. The allowance by the board appears to have been made up as follows: Five days' services, \$25; fees paid, \$1; service and return, \$1.75; total, \$27.75. The following items appear to have been disallowed: Mileage, \$43.40; car-fare, officer and prisoners, \$10. The agreed statement does not state that this \$10 was paid or that it was included in the officer's return. He claimed it in his bill filed with the county clerk and presented to the auditor and the board, but it was not admitted or proved.

The foregoing should be read in connection with that part of the opinion where, referring to the claim for the fees above referred to, it was said that in the absence of any agreement or proof to the contrary it must be presumed that the action of the auditor was supported by the facts.

The correctness of the decision in relation to the effect of the taxation of costs against the county and the necessity of an audit is questioned, and some other criticisms are presented in the petition. All these matters have been reconsidered.

The petitions of both parties for a rehearing are denied.

LOUIS N. ROWLAND, *Appellant*, v. THE HOME INSURANCE COMPANY OF NEW YORK, *Appellee*.

No. 16,208.

## SYLLABUS BY THE COURT.

1. FIRE INSURANCE — *Provision against Encumbrances — Mortgage.* A policy of fire insurance containing a provision which reads: "It is stipulated and agreed if the property or any part thereof shall hereafter become mortgaged or encumbered . . . without written consent hereon, then this policy shall be null and void," will not be rendered invalid by a mortgage upon the insured premises, unless it is a valid and subsisting lien upon the property.
2. WORDS AND PHRASES—"Encumbrance." In such a case, where the insured executed a mortgage for the purpose of securing a promissory note payable more than a year after date, for rent expected to become due under a lease where the term does not commence for five months in the future, and the insured property is destroyed by fire before the commencement of the term under the lease, such mortgage will not be an encumbrance within such provision of the policy.

Appeal from Miami district court; WINFIELD H. SHELDON, judge. Opinion filed April 9, 1910. Reversed.

*Lane & Lane*, for the appellant.

*Fyke & Snider*, for the appellee.

**1 1 1 1**

The opinion of the court was delivered by

GRAVES, J.: This action was commenced by Louis N. Rowland in the district court of Miami county against the Home Insurance Company of New York, to recover upon an insurance policy for loss occasioned by fire. Upon a trial in the district court the defendant recovered judgment for costs, and the plaintiff brings the case here by appeal.

The policy contained a provision which reads: "It is stipulated and agreed if the property or any part thereof shall hereafter become mortgaged or encum-

---

Rowland v. Insurance Co.

---

bered . . . without written consent hereon, then this policy shall be null and void." The defendant claimed that this provision was violated by the insured and the policy thereby rendered void, and for this reason refused payment. No other question is presented. The policy took effect February 25, 1904. The fire occurred November 4, 1904. The plaintiff had executed a mortgage upon the premises insured after the insurance policy was in force and before the fire, but claims that it was not in force and had no legal effect at the time of the fire. The facts are that the plaintiff had rented 200 acres of land for one year from and after March 1, 1905, and was to pay the sum of \$450 rent in cash on January 1, 1906. The lease, note and mortgage were executed but were not intended to become effective until March 1, 1905, when the plaintiff took possession of the lands under the lease. Under these circumstances they were merely preliminary steps taken toward the consummation of an anticipated contract, and until such contract was completed and in force these papers were without present force. A mortgage, to be an encumbrance within the meaning of an insurance policy, must be a valid and subsisting lien upon the property. (13 A. & E. Encycl. of L. 259; 19 Cyc. 757; *Wiegen v. Council Bluffs Ins. Co.*, 104 Iowa, 410, 413; *Smith v. Insurance Co.*, 60 Vt. 682; *Fitchner v. Fidelity Mut. Fire Asso.*, 103 Iowa, 276.) One of the purposes of the provision to prohibit encumbrances from being placed upon insured property is to prevent the ownership of the insured from being diminished in value and his interest in the preservation of the property thereby decreased. A lien which has not taken effect or one which has been extinguished or one which for any reason is not effective and subsisting does not fall in this category and is not an encumbrance.

We conclude that the district court erred in holding that the appellant's mortgage was an encumbrance, and the judgment is reversed, with direction to set aside the

---

Tucker v. Railway Co.

---

judgment in favor of the appellee and enter a judgment in favor of the appellant for the amount due on the policy, when ascertained.

---

J. W. TUCKER, *Appellee*, v. THE MISSOURI PACIFIC  
RAILWAY COMPANY, *Appellant*.

No. 16,208.

SYLLABUS BY THE COURT.

1. **MAXIMUM RATES**—*Transportation of Oil*—*Title of Act*. Chapter 353 of the Laws of 1905 (Gen. Stat. 1909, §§ 7163-7165), establishing maximum rates for the transportation of oil, contains but one subject, which is clearly expressed in its title.
2. ——— *Statutory Damages Not a Fine for Breach of a Penal Law*. The damages recoverable by an aggrieved shipper under the act referred to do not constitute a fine for the breach of a penal law, which must go to the school fund under section 6 of article 6 of the constitution.
3. ——— *"Single-line Rates"*—*"Double-line Rates."* The distinction between "single-line rates" and "double-line rates" in the act mentioned is between rates for shipment over a single line and rates for shipment over more than one line.
4. ——— *Segregation of Transportation of Oil from Transportation of Other Commodities*. The legislature was justified in segregating the transportation of oil from the transportation of other commodities, in making it the subject of special regulation, and in securing observance of such regulations by the imposition of special penalties.
5. ——— *Reasonableness of Rates*—*Judicial Investigation*. The act referred to does not either in express terms or by implication forbid a judicial investigation of the reasonableness of the rates fixed by the legislature, and the question is open for determination by any court in which the carrier may be called to account.
6. ——— *Same*. An opportunity to test once for all in a single suit against some officer or board the reasonableness of legislative rates is not essential to the protection of a carrier asserting that such rates are unreasonable. It is sufficient

---

Tucker v. Railway Co.

---

that the carrier can not be made to suffer the penalties prescribed until the question of reasonableness has been passed upon by a competent court.

7. ——— *Penalties Not Oppressive—Intimidation.* The penalties prescribed by the act in question are not so oppressive that their natural effect is to intimidate carriers from resorting to the courts to test its validity.
8. ——— *Proof that Rates are Unreasonable.* Acts of the legislature fixing rates for transportation by common carriers will not be held to be unconstitutional on the ground that the rates established are unreasonable without the fullest disclosure of all material facts affecting the question.
9. ——— *Same.* The evidence in this case is not sufficient to show that the oil rates fixed by the act of 1905 are unreasonable.

Appeal from Osborne district court; RICHARD M. PICKLER, judge. Opinion filed March 12, 1910. Affirmed.

*Charles H. Nicholas, and B. P. Waggener, for the appellant.*

*Richard H. Towne, and J. W. Tucker, for the appellee.*

The opinion of the court was delivered by

BURCH, J.: The plaintiff recovered a judgment of \$500 against the defendant for a violation of chapter 353 of the Laws of 1905 (Gen. Stat. 1909, §§ 7163-7165), establishing maximum rates for the transportation of oil. The defendant appeals, and contends the statute violates the constitution of the state of Kansas and the constitution of the United States. The title of the act reads as follows:

“An act to establish maximum rates for the transportation of crude oil and the products thereof, to forbid rebates, and provide penalties for the violation thereof.”

Section 1 fixes maximum rates for the transportation of oil within the state of Kansas by single- and by



---

Tucker v. Railway Co.

---

double-line shipments. Section 2 contains the following provisions:

“Every common carrier which shall fail or refuse to accept for shipment or to properly ship or deliver the products named in section 1 hereof, or which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates herein made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney’s fee, to be fixed by the court.”

Section 3 makes the giving of rebates a misdemeanor, punishable by fine and forfeiture of the right to do business.

The defendant claims the title and the body of the act are multifarious. It is plain, however, that a single subject is embraced—the regulation of rates for the transportation of oil and its products—and the statute extends no further than is necessary for efficient regulation. It would be a lame statute if it contained no penalty for its violation. Both civil and criminal remedies may be employed to that end. The remedy by way of damages to the aggrieved shipper is not a fine for a breach of a penal law in the sense of section 6 of article 6 of the state constitution, which provides that moneys derived from that source shall go to the school fund.

It is said the statute denies the defendant the equal protection of the laws guaranteed by the federal constitution because shipments over more than two lines of road are not regulated. This is an unwarranted interpretation of the terms “single-line rates” and “double-line rates” used in the statute. The distinction is between rates for shipment over a single line and rates for shipment over more than one line.

It is said that the act in question discriminates between classes of shippers, and favors oil shippers with liquidated damages and attorney fees which are denied

---

Tucker v. Railway Co.

---

to farmers, stockmen and many other persons engaged in reputable pursuits. The carrier in this case is not a shipper and has no legal right to question the classification of members of a group to which it does not belong. It is also said that the statute discriminates between the defendant and other litigants in the matter of attorney fees. There is nothing in the abstract to show that the plaintiff recovered attorney fees, so the defendant has nothing to complain about in that respect. In view of the defendant's argument, however, it may be observed that for many well-understood reasons, which need not be rehearsed here, the legislature was clearly justified in segregating the transportation of oil from the transportation of other commodities, in making it the subject of special regulation, and in securing observance of such regulations by the imposition of special penalties. All common carriers of oil, including pipe lines (Laws 1905, ch. 315; Gen. Stat. 1909, §§ 3961-3965) are placed under the liabilities complained of, which satisfies the constitutional provisions which the defendant invokes.

The statute referred to relating to the transportation of oil by pipe lines establishes maximum rates for the service. It then gives the board of railroad commissioners authority to fix rates not to exceed those prescribed by the legislature, and provides that the reasonableness of rates fixed by the board may be tested by proceedings in any court of competent jurisdiction. Until the board acts the legislative rates are to stand. The act furnishing the basis of the proceedings under consideration contains no provision for a court review of the rates which it promulgates. From these facts the defendant argues that no right of review exists, and that consequently it is deprived of the equal protection of the laws and of property without due process of law.

The pipe-line act merely expresses a condition which

attaches to all statutes fixing rates or charges for public services unless the legislature has by specific declaration, or by implication equally clear, forbidden an inquiry into the matter of reasonableness. The act in question merely proceeds upon the basis that in the judgment of the legislature the maximum rates established are reasonable. *Prima facie*, this conclusion is correct, but there is no intimation that a judicial investigation of the fact of reasonableness is foreclosed, and such an investigation may be made in any proceeding in which a carrier is called to account under the act. It is true that under the pipe-line act the reasonableness of rates fixed by the board of railroad commissioners may be tested once for all in an appropriate action against the board. The right to a judicial determination of the question of reasonableness, however, is the matter of essence and substance, and not the method of procedure; and so long as the defendant can not be made to suffer until a competent court has passed upon the justice of the legislative rates the guaranties of the federal constitution are not infringed.

Finally it is said that the legislative rates are in effect made conclusive because the penalties for violating the law are great enough to terrorize carriers into submitting rather than to take the chances of succeeding in a test case. This argument is based on the decision in the case of *Ex parte Young*, 209 U. S. 123. The tenor of that decision is shown by the following extracts from the opinion:

"For disobedience to the freight act the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger-rate act renders the party guilty of a felony and sub-

---

Tucker v. Railway Co.

---

ject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . . If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co. v. Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." (Pages 145, 146, 147.)

Compared with the drastic penalties prescribed by the legislature of the state of Minnesota, those of the Kansas statute are mild indeed. The latter are not imposed upon officers, agents or employees, they affect the corporation only, are merely pecuniary, and are neither extravagant nor unreasonable. Therefore the court

holds they are not so enormous that their natural effect is to deter carriers from resorting to the courts to test the validity of the act.

At the trial in the district court the defendant was given an opportunity to show that the statutory rates are unreasonable. It introduced evidence to prove its contention to that effect. The court found otherwise, and the finding is assigned as error. The evidence consisted largely of tables of figures compiled by the defendant's statisticians, supplemented by the testimony of two witnesses. It is claimed that the evidence establishes the following facts:

"(1) The rate fixed by the statute is not compensatory, and that the actual cost of the service, not including fixed charges, or taxes, is greatly in excess of the maximum revenue allowed by the statute.

"(2) That all of the earnings combined of the company in the state, from domestic business, shows an annual loss or deficit of over \$200,000.

"(3) That all of the earnings in the state, from every source, interstate and intrastate, do not show sufficient net revenue to pay to exceed two per cent on one-half of the value of the property, as assessed for taxation."

It is not necessary to analyze this evidence. Some of it is open to the suspicion of want of good faith. Thus the only showing with reference to revenue from intrastate oil shipments consists of receipts for two months of a single year, and those months are July and August. Indeed, there is nothing in the evidence showing what a reasonable rate for the transportation of oil would be or that the legislative rates are too low. The figures to the effect that the Missouri Pacific Railway Company loses money every year on its Kansas business do not tend to show either of these facts. Further suspicion is cast on this evidence by proof presented by the plaintiff showing the defendant voluntarily made double-line shipments of oil in less than carload lots to a noncompetitive point beyond the one where this controversy arose at less than the statutory rates. In the

---

Tucker v. Railway Co.

---

case of *Chicago &c. Company v. Wellman*, 143 U. S. 339, Mr. Justice Brewer pointed out how easily courts might be misled into doing grievous wrong to the public by striking down legislative rate acts on general statements and without the fullest disclosure of all material facts. In delivering the opinion of the court he said:

"A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'" (Page 345.)

The trial court was correct in holding that the defendant's evidence was not sufficient to prove that the statutory rate is unjustifiably low. The judgment of the district court is affirmed.

MRS. M. L. DUNCAN, *Appellee*, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellant*.

No. 16,255.

SYLLABUS BY THE COURT.

1. FINDINGS OF FACT—*Presumptions*. To find a fact by presumption or inference, the inference should be a logical deduction and reasonably certain in the light of all other proper presumptions and of all collateral facts.
2. ——— *Evidence*. Where there is no substantial evidence, direct or circumstantial, tending to prove a material fact in issue, a finding that it exists can not be sustained.

Appeal from Clark district court; GORDON L. FINLEY, judge. Opinion filed April 9, 1910. Reversed.

*M. A. Low*, and *Paul E. Walker*, for the appellant.

*F. C. Price*, *D. W. Harrington*, and *Wallace & Lumpkin*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: This action is for damages for the death of the plaintiff's husband, who was a brakeman in the service of the defendant railway company. In order to set out a freight car at a switch while the train was moving Mr. Duncan stood on the stirrup near a corner of the car next behind the one that was to be set out, grasping the handhold with one hand, and reached down to or toward the lever of the coupling appliance at the end of the car with the other hand. This was the usual way of uncoupling and setting out a car from a moving train, the brakeman thus standing upon the stirrup raising the lever which would lift the pin; he would then go upon the top of the car and set the brakes to hold the detached part of the train in place while the forward part, on signal from the brakeman to the engineer, would move past the switch, and then back, pushing the car to be set out upon the side track. The conductor saw Duncan in the position described, appar-

---

Duncan v. Railway Co.

---

ently ready to raise the lever, and then stepped into the depot. Coming out a minute afterward he saw him rolling out from under a car in the rear, on the opposite side of the train. The uncoupling had been made and the train had parted, but both parts were moving forward. Duncan had not been upon the top of the car and the brakes had not been set. Blood was found upon the ties outside the rail on the opposite side of the track from where Duncan had last been seen, and also upon one of the cars. He was hurt, and died from the injury. The engineer testified that he saw him upon the stirrup, and said that he was leaning over in the car and that he gave the signal to go forward. The jury found, however, that the signal was not given. When asked what he meant by "leaning over in the car" the engineer said that he meant "leaning over against the car, and he would have one hand down pulling." The brake beam of the car was found to be defective. It hung upon brake hangers and chains. In stepping upon it, for some reason not shown, it would sink down.

The claim of the plaintiff is that the lever of the coupling device was disconnected and failed to work and for that reason the deceased was compelled to stoop or lean between the cars to lift the coupling pin with his hand, and in doing so placed his foot on the defective brake beam, which, sinking down, caused him to fall. Evidence was given that where the lever fails to lift the pin it becomes the duty of the brakeman to proceed in that manner when uncoupling moving cars.

The jury found that the ladder, handhold and stirrup were in good order, but that the brake beam and coupling appliance were not in proper condition. They stated that the defect in the latter was that the pin could not be raised by use of the lever. The finding with respect to the brake beam is supported by direct evidence. The finding that the coupling appliance was defective rests entirely upon the circumstances shown



in evidence. The conductor testified that it was in good condition and worked properly immediately after the accident. The argument of the plaintiff to support the finding to the contrary is that the physical facts show that it was necessary to stoop between the cars to lift the pin, which necessity could only arise by reason of a defect in the coupling appliance; that the deceased being an experienced brakeman, as the evidence proved, it must be assumed that he was performing his duties properly; that if the uncoupling could have been made without going between the cars he would have so done it; and that it therefore follows that the injury occurred by reason of the defective coupling, the brake beam giving way when he set his foot upon it, causing him to fall.

The finding that the coupling appliance was out of order rests upon the assumption that the deceased would not otherwise have placed his foot upon the defective brake beam, but there is no evidence that he did place his foot upon the brake beam except the inference or presumption that the coupling appliance was defective, making it necessary to do so to pull the pin with his hand. That facts may be found by presumption or reasonable inference from other facts is elementary, but the contention of the plaintiff goes far beyond this. It is first presumed that the brakeman was doing his duties properly, which is a fair presumption; it is next presumed that he could not lift the pin by use of the lever; it is presumed from this that the appliance was out of order, and because of this defect it is presumed that he stepped upon the defective brake beam, thereby losing his life.

It is argued that the presumption that he could not use the lever is supported by the testimony of the engineer that he saw Duncan leaning in or against the car, but this is a slight circumstance and is not necessarily inconsistent with the use of the lever. It does not show, as claimed, that he went between the cars or was upon

---

Duncan v. Railway Co.

---

the brake beam. It has been said that one presumption of fact can not in law become the basis of another presumption of fact. (*Railway Co. v. Rhoades*, 64 Kan. 553; *Railway Co. v. Baumgartner*, 74 Kan. 148.) This doctrine is assailed by a distinguished writer (1 Wig. Ev. § 41), and it has been held that it is subject to exceptions. (*Hinshaw v. The State*, 147 Ind. 334, 363; *Burrill Cir. Ev. p. 138*.) An examination of the discussions upon this subject leads to the query whether there has not been much strife about words concerning it. The real question must always be whether there is substantial evidence, direct or circumstantial, fairly tending to prove the fact in issue. Presumptions, as understood in the law of evidence, must have substantial probative force as distinguished from surmise. If a fact may be established by inference from the presumption of another fact, it should at least be a logical deduction and reasonably certain in the light of all other proper presumptions and of all collateral facts. The chain of presumptions ought not to be extended into the region of conjecture. (*Diel v. Mo. Pac. Ry. Co.*, 37 Mo. App. 454.) A fact is not proved by circumstances which are merely consistent with its existence. (*Carruthers v. C. R. I. & P. Rly. Co.*, 55 Kan. 600.)

The lamentable death of this man may have been caused by some mischance after the uncoupling was effected. It may have been caused in the manner claimed by the plaintiff. Possibly one conjecture is as reasonable as another, but the evidence does not reveal the cause of his fall. In the absence of such evidence there can be no recovery. (*Hart v. Railroad Co.*, 80 Kan. 699.) It has been said recently by this court:

"It is not sufficient to show circumstances which would indicate that the other party might have been guilty of negligence, especially when the evidence furnished suggests with equal force that the injury might have resulted without fault on the part of the other party." (*Brown v. Railroad Co.*, 81 Kan. 701, syllabus.)

## Remington v. Walthall.

While it is presumed that this employee was properly performing his duty, the same presumption applies to the company. Governed by principles of law well settled in this state, and in other jurisdictions, the judgment must be reversed and the cause remanded for a new trial.

J. B. REMINGTON, *Appellant*, v. J. T. WALTHALL *et al.*,  
*Appellees*.

No. 16,265.

## SYLLABUS BY THE COURT.

1. CITIES AND CITY OFFICERS—*Shade Trees Growing in Streets—Nuisance—Abuse of Discretion*. In the exercise of their delegated powers to grade and improve streets municipal authorities are vested with discretion to determine whether growing trees are nuisances and what obstructions shall be removed, and when their decision is made every reasonable intendment of good faith should be indulged, but an arbitrary decision by an officer, not made in good faith, that shade trees of an abutting owner are a nuisance, when in fact they are not and where there is no reason or public necessity for cutting them down, is no protection or defense to the officer who cuts them down when an action is brought against him to recover for the injury and loss.
2. ——— *Resolution or Ordinance*. It is competent for the city council to pass a resolution directing the officers in charge of the grading of a street not to cut down certain shade trees until such action shall have been authorized by the council.

Appeal from Miami district court; WINFIELD H. SHELDON, judge. Opinion filed April 9, 1910. Reversed.

*Frank M. Sheridan*, for the appellant.

*E. J. Sheldon*, and *S. J. Shively*, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: This action was brought by J. B.

---

Remington v. Walthall.

---

Remington against the city of Osawatomie, J. T. Walthall, as mayor, and W. H. Hickman, as street commissioner of the city, and also against Walthall and Hickman as individuals. The city as well as the mayor and street commissioner went out of the case upon a ruling sustaining a demurrer as to them, and the case thereafter proceeded against Walthall and Hickman alone. Remington alleged, and the proof tended to show, that he owned a home in Osawatomie which fronted on Main street, and on this street he had built a sidewalk and had planted fourteen shade trees, which had been growing there for over twenty years. The city authorities had notified Remington that he must build a new sidewalk on a lower grade, and Remington had learned of an intention by the mayor and street commissioner to cut down his shade trees growing in the street in front of his home. He appeared before the council and protested against the cutting of the shade trees, and that body passed a resolution to the effect that thereafter no shade trees should be cut until the same should be specifically authorized by the city council. Testimony was offered that in defiance of this order, and without submitting the question to the council, Walthall, the mayor, and Hickman, the street commissioner, acting together, cut down the shade trees, lifted the sidewalk and tumbled it over upon the lawn while Remington was absent from the city, and proceeded with the grading of the street. In their answer they alleged that the work was done in pursuance of an ordinance, but no copy of such an ordinance was pleaded and none was produced in evidence. It was also averred that the cutting of the trees was necessary in order to bring the street in front of Remington's property to grade, but Remington met these averments of the answer with general denials. In addition to the evidence mentioned, Remington produced testimony that there was a city ordinance regulating the parking of streets and the planting and protecting of shade trees, which provided

---

Remington v. Walthall.

---

for the punishment of those who injured or destroyed such trees. There was testimony that Walthall, the mayor, resented the action of Remington in appearing before the council and obtaining the order to stop the cutting of shade trees, and then remarked that Remington "thought that he had his auger in me but I have my auger in him and I will keep it there." One of the excuses he made for cutting the trees was that he had a street force organized and employed and that he did not have any other work for them to do. There was testimony to the effect that when Remington asked the mayor to defer action until a dispute as to a survey of the street could be settled, stating to him that if the old survey was adopted he would put in a new sidewalk at once, Walthall responded in an angry and offensive manner "that if I [Remington] undertook to do a bit of work up there except right where he told me that he would have me arrested." The trees were cut, it appears, after the resolution was passed by the council and without the concurrence of that body. No testimony in behalf of Walthall or Hickman was offered, as the court sustained their demurrer to Remington's evidence and gave judgment against him.

An abutting lot owner has an interest and ownership in the shade trees planted and growing in the parking in front of his lots. An assessment may even be made against his lots to pay for the charge of planting and maintaining shade trees in the street in front of his premises. (*Heller v. City of Garden City*, 58 Kan. 263.) An owner holds his right to the trees planted to adorn and improve his lots subject to the paramount right of the public to the use of the streets, but it is an ownership which gives him a standing in court to prevent an unauthorized and unjustified destruction of the trees by officers or others. (*Paola v. Wentz*, 79 Kan. 148.) The city authorities are, of course, not to be hampered in the improvement or control of the streets, and when they decide that a tree or other obstruction is a nuisance

—

and that the public good requires that it should be abated or removed every reasonable intendment of good faith and honesty of the officers will be indulged. But a tree, however, does not become a nuisance merely because a city officer has declared it to be such. A decision arbitrarily made that a tree maintained by an abutting owner is a nuisance and should be cut down, when in fact it is not an obstruction and there is no reason or public necessity for removing it, is no defense for the official or individual who arbitrarily and unnecessarily destroys it. In *Frostburg v. Wineland*, 98 Md. 239, it was decided that shade trees growing on a street are not a nuisance *per se* and only become so when they interfere with the use of the street, and it was there said:

"It is clear, we think, both upon reason and authority, that when a municipality undertakes to destroy private property which is not a nuisance *per se*, it then transcends its powers and its acts are reviewable by a court of equity." (Page 244.)

In this case there was no proof of an ordinance authorizing the mayor or street commissioner to change the grade of the street or to cut down the trees and remove obstructions from streets, and so far as the abstract shows their action in this respect was without authority. If they had reached the defense and offered testimony they possibly might have produced an ordinance giving them general authority to grade and improve streets. If it be assumed that such authority existed, it is one which must be exercised in good faith by the officers. Indeed, there is testimony that the officers were actuated by malice in the action taken, and if they were vested with any discretion to decide upon the removal of the trees such discretion was in fact abused. In such a case the owner is entitled to recover damages from the one who destroys his property. In this instance the trees appear to have been destroyed against the will of the city council and in spite of its order.

---

Remington v. Walthall.

---

It is claimed, however, that the order of the council was without force because it was in the form of a resolution instead of an ordinance. It is true, as appellees contend, that the statute provides that the powers of the council to open and improve streets and the like is to be exercised through ordinances adopted in a certain manner, which is prescribed. A statutory direction that certain steps shall be taken by ordinances leaves no discretion in the council as to methods, and in a general way it may be said that every step that is legislative in character must be accomplished by an ordinance. There are many things, however, of a ministerial and administrative character that may be accomplished by a resolution. In *McQuillin on Municipal Ordinances*, section 2, it is said:

“Whether the particular thing should be done by ordinance or resolution depends upon the proper construction of the charter and the forms observed in doing the act. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a temporary character only. It may be stated as a general rule that matters upon which the municipal corporation desires to legislate must be put in the form of an ordinance, while all acts that are done in its ministerial capacity and for a temporary purpose may be put in the form of resolutions.”

It would seem that a ministerial act or a mere detail in the execution of a power or provision for some temporary matter, applicable alone to a single and individual case, might be accomplished by means of a resolution. So it has been decided that a resolution for the purchase of apparatus for a fire department would bind the municipality. (*Green v. City of Cape May*, 41 N. J. Law, 45.) A resolution has been held to be sufficient to fix the amount of a license fee previously authorized. (*The City of Burlington v. The Putnam Insurance Company*, 31 Iowa, 102; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370.) It has been held to be sufficient to direct municipal agents to make proper

contracts, as well as to appoint municipal agents. (*City of Alton v. Mulledy et al.*, 21 Ill. 76; *Egan v. City of Chicago*, 5 Ill. App. 70.) It has been treated as a proper method of directing a conveyance of certain property (*Morgan v. Johnson*, 106 Fed. 452), and, also, for waiving the time of performance of a contract. (*Hubbard et al. v. Norton et al.*, 28 Ohio St. 116. See, also, 1 Beach Pub. Corp. § 485; 1 Dillon Munic. Corp., 4th ed., § 307.) These cases illustrate the trend of authorities, but of course they depend to quite an extent upon the charter acts under which the municipalities were acting. Some of them may be inconsistent with our general laws providing for the government of cities. In case of an ordinance providing for the planting of trees in a park, for instance, without specifying how many or what kinds of trees or shrubs should be planted, it would seem that a resolution might be adopted prescribing how many of each kind of trees should be planted in that park. It would appear, too, that there is no impropriety in providing by resolution that the officers in charge of grading streets should consult the council or a committee of the council as to whether it was necessary that particular shade trees should be cut down. It is not uncommon for administrative officers to confer with a committee of the council having the special matter in charge, and so far as anything is shown in the record the action of the council in passing the resolution was a just and proper exercise of its powers. The fact that the officers ignored the resolution tends at least to establish the charge that they acted arbitrarily and oppressively in destroying the shade trees in question.

The judgment is reversed and the case remanded for further proceedings.



D. M. BALDRIDGE, *Appellant*, v. LEOPOLD CENTGRAF,  
*Appellee*.

No. 16,444.

SYLLABUS BY THE COURT.

1. **CONTRACTS — *Specific Performance — Grounds.*** The ground upon which a court, notwithstanding the statute of frauds, may compel the complete performance of an oral contract for the sale of real estate, which has been partly performed, is that such a decree may be necessary in order to avoid injustice toward one who in reliance upon the agreement has so altered his position that he can not otherwise be afforded adequate relief.
2. ——— ***Possession Taken with Owner's Consent.*** The mere fact that a proposed buyer has taken possession of real estate with the consent of the owner, upon the faith of an oral agreement for its purchase, does not in and of itself avoid the effect of the statute and justify a decree for the specific performance of the contract.
3. ——— ***Possession and Deposit of Check for Purchase Price.*** In the absence of any further showing as to the injury that would result to the plaintiff by a denial of that relief, a decree for the specific performance of an oral contract for the sale to him of a dwelling house is not justified by evidence that, having deposited a valid check for the purchase price with a third person, mutually agreed upon, to be delivered upon the execution of a deed, he took possession of the premises by the owner's permission, but was on the same day served with a notice to vacate.
4. **EJECTMENT—*Evidence of Plaintiff's Title—Admissions.*** In ejectment, where the defendant claims a right of possession only under a contract with the plaintiff for the purchase of the property, evidence of title on the plaintiff's part becomes immaterial.

Appeal from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed April 9, 1910. Reversed.

F. A. Dinsmoor, for the appellant.

James Lawrence, and Levi Ferguson, for the appellee.

The opinion of the court was delivered by

MASON, J.: D. M. Baldridge brought ejectment against Leopold Centgraf, who defended on the ground of an oral contract for the purchase of the property, rendered enforceable by having been partly performed. The court found in favor of the defendant and rendered a judgment for the specific performance of the contract, from which the plaintiff appeals.

The evidence showed an oral agreement between the parties for the sale of the property, which included an unoccupied dwelling house. The buyer deposited his check for the purchase price with a third person, mutually agreed upon, to be delivered in exchange for a deed. According to his testimony (which, although contradicted, must be accepted as true in view of the finding of the trial court), he then said that he wanted to move in and the owner told him either that he would or that he could. He did move in, but on the same day received from the owner a writing notifying him to vacate the premises and asserting that he was merely a trespasser thereon. The owner followed up the notice with a proceeding under the forcible entry and detainer article, but, upon the defendant's claiming title, abandoned that for the present action.

Although by putting up his check the defendant did all that was incumbent upon him in that regard, the deposit did not amount to a payment. No money changed hands; the plaintiff received none, the defendant parted with none, and there was therefore none to be repaid in order to restore the parties to their original position. No showing was made that the defendant had improved the property or otherwise incurred expenses or placed himself at a disadvantage in any respect in reliance upon the contract. The case therefore presents the question, which this court has not heretofore been required to decide, whether in and of itself the fact that a proposed buyer has taken pos-

---

Baldridge v. Centgraf.

---

session of real estate with the consent of the owner, upon the faith of an oral agreement for its purchase, so far avoids the effect of the statute of frauds as to justify a decree for the specific performance of the contract. The opinion in *Edwards v. Fry*, 9 Kan. 417, 423, includes the statement that delivery of possession will take a case out of the statute of frauds, but there the possession was in fact accompanied by the making of permanent improvements, and that circumstance was treated as a determining factor. In *Baldwin v. Baldwin*, 73 Kan. 39, 45, it was said that while the statement referred to is supported by the weight of authority, if the question were a new one the court would incline to hold that bare possession is not sufficient. The precise question involved is considered in an exhaustive note in 3 L. R. A., n. s., 790, which is supplemented by further citations in 8 L. R. A., n. s., 870. In the introductory portion of the note it is said:

“Whether possession, standing by itself, is enough to do away with the plain words of the act is a troublesome question, upon which there is considerable conflict of opinion, and apparently some confusion. . . . The rule that possession alone is sufficient to remove the bar of the statute appears to have sprung largely from *obiter* statements to that effect. In many cases in which the rule is announced other acts in part performance besides possession appear, although the courts seem to uphold the oral contract on the ground of possession alone. . . . The idea that one who had gone upon land under an oral contract might be driven off as a trespasser if he could not take refuge behind his agreement is the main support of the English doctrine of part performance, and of the rule that possession alone is sufficient to answer for the writing required by the statute. That it was necessary to break the statute to such an extent to shield the party in possession from the pains and penalties which might follow a trespass has been doubted. . . . In this country the courts have been swayed for the most part by the idea that it would be a shock to the conscience to allow one who had put another in a hard position to throw up his contract and get off under cover of the

statute. The statute would thus be aiding and abetting fraud, which it was its design and purpose to prevent. Under the fraud theory, pure and simple, possession alone would not necessarily be a sufficient act of part performance to take an oral contract relating to real estate out of the statute, since the party to whom possession had been delivered might be put back where he was before the contract, and no real loss be suffered by him as a result of the transaction." (Pages 790, 791, 792.)

The argument in favor of what has been regarded as the general rule is thus outlined in volume 2 of the thirteenth edition of Story's Equity Jurisprudence, section 761:

"Nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed. Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose there seems no reason why it should not be admissible throughout."

We do not think it follows that if proof of the existence of an oral agreement is admissible the contract itself must be capable of enforcement. The statute does not make an oral contract for the sale of real estate illegal or void, nor does it forbid evidence thereof to be given for any purpose consistent with the statute. (*Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Glass v. Hulbert*, 102 Mass. 24, 33, 34.) The law, in letter and in spirit, is that no one shall be charged upon such a contract; that is, he shall not be compelled to perform it or to answer in damages for his refusal to do so. One party can recover nothing of the other on account of the loss of the fruits of his bargain, but no reason is apparent why if in reliance upon the agreement he

---

Baldridge v. Centgraf.

---

has incurred expense he may not assert a claim for reimbursement, not under the contract, but upon all the facts of the case. Such a practice was recognized in *Deisher v. Stein*, 34 Kan. 39, where it was said:

"Of course the case should not be taken out of the statute of frauds any further than is necessary to do justice and to prevent fraud; and to pay the plaintiff a fair compensation for what he has lost by reason of the parol agreement between the parties is probably sufficient for that purpose." (Page 42.)

The mere payment of money is not such part performance as upon this principle to take a contract out of the statute of frauds, because the recipient can be compelled to restore it. (26 A. & E. Encycl. of L. 54; 29 A. & E. Encycl. of L. 838; 20 Cyc. 297, 298; *Baldwin v. Squier*, 31 Kan. 283, 284.) The verbal agreement is not the basis of an action for that purpose, but evidence of its terms is often necessary to establish the implied contract upon which recovery is sought.

"In an action to recover upon an implied promise to pay for partial performance of a contract within the statute of frauds, the contract is admissible in evidence, not as being binding and conclusive as to the amount of recovery, but merely as a circumstance to be considered in estimating the value of what has been done." (29 A. & E. Encycl. of L. 842.)

The ground upon which a court, notwithstanding the statute of frauds, may compel the complete performance of an oral contract for the sale of real estate, which has been partly performed, is that such a decree may be necessary in order to avoid injustice toward one who in reliance upon the agreement has so altered his position that he can not otherwise be afforded adequate relief. His mere entry into possession with the consent of the owner does not in and of itself meet this condition. It does not make him a trespasser in fact, and a decree of specific performance is not necessary to protect him from liability as such. Nor does it in and of itself place him at any disadvantage or involve him in

any loss. True, whenever he has made permanent improvements upon the property the courts are ready to order a conveyance, even although it might be possible to provide compensation in damages. A sufficient reason for this is that alterations in the artificial features of real estate are so largely a matter of individual taste that the loss to their designer in being deprived of their benefit might not be adequately measured, either by the increased value of the property or by his expenditures in making them. And whenever possession is taken under such circumstances that its relinquishment involves a disadvantage, apart from the mere loss of the benefits of the bargain, a case may be presented for equitable relief, dependent upon the special circumstances. Nothing having been shown here beyond the bare fact of possession, we think the court erred in finding for the defendant.

A question is raised regarding the proof of title, but it is rendered immaterial by the fact that the defendant admitted deriving his possession from the plaintiff and justified it under the contract for the purchase of the property. (*O'Brien v. Wetherell*, 14 Kan. 616; 10 A. & E. Encycl. of L. 501.)

The judgment is reversed and a new trial ordered.

---

MAGGIE O'NEIL *et al.*, Appellants, v. FRED L. EPTING,  
as Executor, etc., *et al.*, Appellees.

No. 16,448.

SYLLABUS BY THE COURT.

JURISDICTION — *Action by Cestui que Trust against Trustee.*

Where by the terms of the contract which created the trust a *cestui que trust* is forced to rely upon his trustee's personal liability he occupies a position toward the estate of the trustee which is identical with that of a contract creditor, and in such a case he may maintain an action at law against the

---

O'Neil v. Epting.

---

trustee or the administrator of the trustee's estate to recover a debt matured by the terms of the contract.

Appeal from Coffey district court; **FREDERICK A. MECKEL**, judge. Opinion filed April 9, 1910. Reversed.

*E. N. Connal, J. M. Pleasant, and Joe Rolston*, for the appellants.

*Henry E. Ganse, and Louis H. Hannen*, for the appellees.

The opinion of the court was delivered by

**SMITH, J.**: The appellants filed in the probate court of Coffey county a claim against the estate of David O. Owens, deceased, as follows:

“**BURLINGTON, KAN., January 11, 1908.**

“In the Probate Court of Coffey county, Kansas.

“Estate of David O. Owens.

“To Maggie O'Neil and Hugh Hughes, Dr., 1905, March 1.

“To money and property turned over to said Owens by Hannah Owens (formerly Hannah Hughes and the mother of Maggie O'Neil and Hugh Hughes), in about 1868, in consideration of which the said David O. Owens then orally agreed to hold the same in trust for the use thereof and at his death to pay the principal to the said Maggie O'Neil, formerly Maggie Hughes, and Hugh Hughes, and which money and property was of the value and valued by the said Hannah and David O. Owens at the sum of \$900; to interest on same from David O. Owens's death to date, \$157. Total, \$1057.”

The claim was properly verified and was set for hearing, at which all parties appeared. The executor demurred to the evidence introduced in support of the claim, which demurrer the court overruled, but upon the declination of the executor to offer any evidence on his part the court disallowed the claim. The appellants thereupon appealed to the district court. Upon the trial in the latter court the appellants introduced evidence which showed, *prima facie*, that about

the year 1868 their mother, then the wife of David O. Owens, delivered to Owens money and securities of the agreed value of \$900, upon an oral agreement that he should hold and have the use thereof during his lifetime and at his death should pay such sum to the appellants, her children by a former marriage; that Owens accepted the money and securities and agreed to repay the \$900 to the appellants at his death; that Owens, at the time of his death, February 27, 1905, was a resident of Coffey county; that on March 27, 1905, Epting was appointed and qualified as executor of the estate, and gave due notice of his appointment as such, April 6, 1905; that on January 11, 1908, the claim was exhibited to the executor, and was filed in the probate court January 23, 1908; that no part of such sum of money had been paid to the appellants or to either of them by Owens or by his executor.

Thereupon the executor renewed his motion to dismiss the case. The motion was sustained for the following reason, as expressed by the court: "I regard it as a trust fund that can't be established against an estate in that way." In this the court erred. The evidence produced entitled the appellants, *prima facie*, to judgment. It should be observed that the relief sought was not to have property which ostensibly belonged to the estate of Owens decreed to belong to the beneficiaries of the trust and to be no part of the estate; nor was it sought to establish that funds had come into Owens's hands as a trust and had been so used by him that they could not be traced; nor was it sought to carve the amount out of the estate for the beneficiaries in preference to all creditors or legatees. The claim is that by the terms of the contract the trustee was to have the use of the funds during his lifetime, and at his death he was to pay, and pledged his personal responsibility to pay, the sum of \$900 to the beneficiaries. Neither law nor equity implies any new contract for the parties. The appellants accepted the arrangement,



---

Smith v. Railway Co.

---

as they were compelled to; otherwise they had no claim in law or equity. Accepting the contract made for their benefit by their mother, they became at Owens's death his creditors, and he became their debtor. In volume 2 of Beach on Trusts and Trustees, section 690, it is said:

"*Cestui que trust*, when forced to rely upon his trustee's personal liability, occupies a position toward the estate of the trustee which is no better, but is identical with that of a simple contract creditor."

This excerpt is quoted with approval in *Holderman v. Hood*, 70 Kan. 267, 285. (See, also, *Ryan v. Phillips*, 3 Kan. App. 704, and cases there cited; *Metcalfe v. Union Trust Co.*, 181 N. Y. 39; *Harrigan v. Gilchrist*, 121 Wis. 127; 28 A. & E. Encycl. of L. 905.) It follows that the probate court and the district court each, in succession, had jurisdiction to adjudicate the claim.

The judgment is reversed and the case is remanded for further proceedings in accordance herewith.

---

BENJAMIN SMITH, *Appellee*, v. THE MISSOURI PACIFIC  
RAILWAY COMPANY, *Appellant*.

No. 16,462.

SYLLABUS BY THE COURT.

1. PERSONAL INJURIES—*Fellow Servants*—*Section Men*. A section man engaged in track repairing who is injured by the negligence of a fellow laborer is within the protection of the fellow servant act. (Laws 1907, ch. 281, § 1; Gen. Stat. 1909, § 6999.)
2. RAILROADS—*Injury to Employee*—*Notice of Claim for Damages*. A notice of such an injury and claim for damages, required by that act, mailed to an assistant claim agent of the railway company whose duty it is to examine and act upon such claims and who receives the notice and makes such examination in pursuance thereto, is notice to the company.

Appeal from Anderson district court; CHARLES A. SMART, judge. Opinion filed April 9, 1910. Affirmed.

STATEMENT.

THE plaintiff, a section man engaged in track repairing, was tamping stone under a crosstie when a fellow laborer, who was tamping stone under another crosstie behind him, negligently struck the plaintiff's hand with a tamping pick, inflicting the injury for which the action was brought. A notice, as required by section 1 of chapter 341 of the Laws of 1905, was served by mail, addressed to the assistant claim agent of the defendant at Kansas City, Mo. The injury occurred in this state.

Demurrers to the petition and to the evidence were overruled. Special findings were returned by the jury, with a verdict for the plaintiff. The defendant appeals from a judgment thereon.

*B. P. Waggener, and J. M. Challiss, for the appellant.*

The opinion of the court was delivered by

BENSON, J.: The defendant contends that section men in doing the ordinary work of repairing track are not within the purview of the statute imposing liability upon a railroad company for injuries to an employee caused by the negligence of its agents or the mismanagement of its engineer or other employees. (Laws 1907, ch. 281, § 1; Gen. Stat. 1909, § 6999.) The defendant relies upon the opinion in *Railway Co. v. Medaris*, 60 Kan. 151. In that case it was held that an employee of a railway company who was engaged in setting a curb around a depot and office building, and who was injured by a falling curbstone which had been negligently left in an insecure position by a fellow laborer, was not within the protection of the statute. It was said in the opinion:

"No train was passing or near the place where Me-

---

Smith v. Railway Co.

---

daris was at work at the time the injury was inflicted. It is true, also, that he was at work for a railroad company, and upon the land of a railroad company, but this does not entitle him to the benefits of the act. He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad." (Page 154.)

In *Union Trust Co. v. Thomason*, 25 Kan. 1, a trackman riding upon a hand car from his work at the close of the day's service was hurt by a collision with another hand car, caused by the negligence of his fellow workmen in propelling the other car. It was held that he was injured while in the line of duty, and that the case was within the provisions of the statute. Mr. Chief Justice Horton, in delivering the opinion, quoted with approval from several Iowa cases where it had been held that trackmen, switchmen and others whose duties require them to be upon the track are more or less exposed to the hazards of the business of operating a railroad. In *U. P. Rly. Co. v. Harris*, 33 Kan. 416, it was held that the statute applied to a section man engaged in repairing a track. The injury had occurred by the negligence of a fellow employee in removing a rail from a push car. His duties did not require him to ride upon cars, nor was he exposed to the perils caused by the operations of trains, other than such as were incidental to his work upon the track. In the opinion the fact that a different rule had been applied in Iowa in recent cases, apparently departing from earlier decisions, was ascribed to the fact that the Iowa code had been changed so as to restrict the application of the statute to wrongs connected with the use and operation of the railroad. The decisions under the amended statute in Iowa appear to have limited its operation, as stated in *Dunn v. Railway Co.*, 130 Iowa, 580, so that a section hand in his ordinary work, wholly disconnected from the use and operation of the

---

Smith v. Railway Co.

---

road, is excluded from its purview, but as indicated in the majority opinion in that case, and more fully stated in a vigorous dissent, the decisions in that state have not uniformly sustained this view.

In the case of *A. T. & S. F. Rld. Co. v. Koehler, Adm'x*, 37 Kan. 463, a laborer engaged in loading rails upon a car, in the case of *A. T. & S. F. Rld. Co. v. Brassfield*, 51 Kan. 167, a section man unloading ties to be used in repairing track, and in the case of *C. K. & W. Rld. Co. v. Pontius*, 52 Kan. 264, a bridge carpenter engaged in loading timbers on a car, were held to be within the operation of the statute, and in the cases named recoveries for injuries sustained through the negligence of a coemployee were sustained. In the case last cited it was argued that the statute, when so construed, was obnoxious to the federal constitution, but upon review in the supreme court of the United States its constitutionality was sustained. (*Chicago &c. Railroad Co. v. Pontius*, 157 U. S. 209.) In *A. T. & S. F. Rld. Co. v. Vincent*, 56 Kan. 344, it appeared that two section men, with a foreman, were carrying a rail to place it in the track. By the negligence of the foreman one of the men was injured. In the opinion it was said:

"The service in which Vincent (the injured man) was engaged was performed on the company's road, and, being necessary to its use and operation, places him within the provisions of the act which makes railroad companies liable to their employees for damages resulting from the negligence of a coemployee." (Page 347.)

It will be observed that there was no car or engine at or about the place of injury. In the Harris case, *supra*, a hand car only was being used, while in the other cases referred to standing cars were being loaded or unloaded, and there was no movement of trains, cars or engines upon the track at the time or place of the injuries.

---

Smith v. Railway Co.

---

The Missouri supreme court, in *Callahan v. Mer. Bridge Terminal Ry. Co.*, 170 Mo. 473, held that a section man, while stationed underneath a portion of the track elevated over a street to give signals to fellow laborers above when to throw down discarded ties, in order that passers-by might not be hurt, was, while attempting to remove a child from danger, within the protection of a statute making railroad companies liable for injuries sustained by any servant of such railroad by reason of the negligence of any other servant or agent thereof. The Missouri statute construed in the opinion provides that "every railroad corporation . . . shall be liable for all damages sustained by any agent or servant thereof, while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof." (Rev. Stat. Mo., 1899, § 2873.) In an elaborate review of the authorities in Missouri and other states, including our own, the court said:

"It is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employee may recover if injured by the negligence of a fellow servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad." (Page 495.)

In Georgia a recovery against a railroad company for the death of an employee working upon one of its bridges, caused by the negligence of a fellow employee, was sustained. (*Georgia Railroad v. Ivey*, 73 Ga. 499.) The court said that an earlier decision declaring that principle had been powerfully assailed, but had been long recognized as law; that it was firmly established in the jurisprudence of the state; and that both the employee and the railroad corporation had contracted with each other in the light of the law as thus construed.

---

Smith v. Railway Co.

---

A statute of Minnesota makes railway companies liable to their servants for damages caused by the negligence of a fellow servant. Construing this statute, it was held that a railroad company was liable to a section man who, while engaged with the rest of the crew in performing his ordinary duties in lifting and carrying a rail to repair the track, was injured by the negligence of a fellow servant in releasing his hold and dropping the rail. It was stated in the opinion that the work was being done in great haste, so as to accomplish it before the arrival of a coming train. The court said:

"We have held that the test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are, in some respects, similar to those used in some other kinds of business, but that if there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies." (*Blomquist v. Great Northern Ry. Co.*, 65 Minn. 69, 70.)

Mr. Justice Brewer, in an opinion in the circuit court of appeals, reviewed the Kansas statute and the Kansas cases referred to in this opinion, except the case of *Railway Co. v. Medaris*, 60 Kan. 151, which had not been decided, and held that they authorized a recovery by an employee in a roundhouse for an injury caused by the negligence of a fellow employee while handling a driving rod in putting an engine in order for use. (*Chicago, R. I. & P. Ry. Co. v. Stahley*, 11 C. C. A. 88.) In the opinion, referring to the case of *U. P. Rly. Co. v. Harris*, 33 Kan. 416, it was said:

"It will be seen that this injury in no way resulted from the actual movement of trains, but occurred while the party injured and the negligent coemployee were engaged in the work of putting the track in condition for use." (Page 91.)

## Smith v. Railway Co.

Then, after quoting from the case of *A. T. & S. F. Rld. Co. v. Koehler, Adm'x*, 37 Kan. 463, it was said:

"A roundhouse is as much a necessity for railroad-ing as a stable for the livery business. He was not engaged in repairing an old engine or constructing a new one, but in putting that engine which had recently arrived in condition for immediate use. He was, as in those cases, not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains—as much so as that of repairing the track. (Page 92.)

The opinion last cited suggests the grounds upon which the *Medaris* case is easily distinguishable from the *Harris* case and other cases where recoveries have been sustained although the service did not include any participation in the movement of trains. In those cases, and in the one now under consideration, the work was upon the track, but this exposed the laborers to the hazards of passing trains, requiring vigilance and attention in proportion to the frequency of their passage.

The constitutionality of the statute was upheld in *C. K. & W. Rld. Co. v. Pontius*, 52 Kan. 264, and in *Missouri Railway Co. v. Mackey*, 127 U. S. 205. Similar statutes have been upheld in other decisions, state and federal, cited in *Callahan v. Mer. Bridge Terminal Ry. Co.*, 170 Mo. 473. Such legislation applying to particular bodies or associations, imposing upon them additional liabilities, is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. (*Missouri Railway Co. v. Mackey*, *supra*.) The same opinion holds that such statutes are not obnoxious to the fourteenth amendment. Nor are they unreasonable (*Thompson*

---

Smith v. Railway Co.

---

*v. The Central Railroad and Banking Company*, 54 Ga. 509), violative of the principle of equality, or otherwise unconstitutional. (Labatt Mas. & Serv. § 643, *et seq.*)

It is contended that the language of the statute, "negligence of its agents, . . . mismanagement of its engineers or other employees" (Laws 1905, ch. 341, §1), excludes employees whose negligence caused the injury except those of the same class, *i. e.*, agents in charge of stations and engineers and others operating or participating in the movement of trains. The decisions of this court already referred to have determined adversely to this contention. The negligence of a fellow servant in the same service with the injured party is held to bind the company. It would overturn a rule long followed and firmly fixed in our jurisprudence to hold otherwise, and would be contrary to the trend of judicial decisions.

Error is alleged in the admission of a copy of a notice served under that clause of the statute imported into it by amendment requiring notice to the company within a specified time. A carbon copy of such notice was produced by the plaintiff, and testimony given that a duplicate had been mailed to the defendant's assistant claim agent at Kansas City, and that it was not in the possession of the plaintiff. Notice to produce it had not been given, and an objection was made to the copy. It was shown, however, that the person to whom the notice was addressed had appeared within the time given by the statute for giving it and examined the plaintiff concerning the claim, promised to report to the general claim agent thereon, and requested that no further action be taken for sixty days, which request was acceded to. It was also shown that this claim agent, when thus making the examination, had in his possession the notice so mailed to him. Receipt of the notice was shown by the fact that it was seen in that officer's hands. Evidence was given tending to show



---

Milling Co. v. Railway Co.

---

that it was his duty to examine such claims and he did in fact examine this one. The provision of the statute that service may be made upon certain agents does not exclude a proper notice given to the company in some other manner (*Central Branch Rld. Co. v. Ingram*, 20 Kan. 66), especially when acted upon by its officers charged with such duties. A failure to show the service of the statutory notice, however, would not have been fatal, for the record shows that the section foreman took and forwarded to the company a written statement, signed by the plaintiff, stating the injuries, and giving the time and place, within a few days after the occurrence. The company produced and placed this written statement in evidence. It had sufficient notice. (*Smith v. Railway Co.*, ante, p. 136.)

The fact that the opinion in the case of *Railway Co. v. Medaris*, 60 Kan. 151, was relied upon by the defendant as a departure from former decisions in the interpretation of the statute is believed to justify this review of the subject. The present case does not fall within the class to which the *Medaris* case belongs, but is within the principles announced in former decisions. The judgment is affirmed.

---

THE UDALL MILLING COMPANY, a Partnership, etc.,  
Appellees, v. THE ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY, Appellant.

No. 16,454.

SYLLABUS BY THE COURT.

1. RAILROADS—*Delay in Furnishing Cars Applied for—Penalties—Limitation of Actions.* The reciprocal demurrage act, among other things, provides that when a shipper applies to a railway company for cars they must be furnished within a specified time, and that if the railway company fails to furnish them within that time it shall forfeit \$1 per day for each car it fails to furnish. *Held:* (1) In an action brought to re-

## Milling Co. v. Railway Co.

cover penalties under that act, the one-year statute of limitations applies. (2) For each day of neglect after the prescribed time a penalty of \$1 per car was at once incurred, on which the statute of limitations began to run. Each penalty was a distinct liability, and when the statute was set in motion on such a liability it continued to run until the action was commenced or barred. (3) The subsequent furnishing by the railway company of the cars demanded stopped the accumulation of penalties, but did not arrest the running of the statute as to penalties already incurred.

2. ——— *Duty to Provide Equipment and Cars—Noncompliance with Statute Excused by Unavoidable Accident.* It is the duty of a railway company to provide such equipment and cars as will meet not only the ordinary and usual requirements of the traffic but also provide for such increase of business and demands for cars as can reasonably be anticipated. If, however, there is a rush of business or a congestion of traffic which could not reasonably have been anticipated, and there is a delay arising from circumstances beyond the control of the railway company, it will be deemed to be abnormal and such an unavoidable accident as will excuse noncompliance with the demand for cars and relieve the company from the penalties provided for in the act.

Appeal from Cowley district court; CARROLL L. SWARTS, judge. Opinion filed April 9, 1910. Reversed.

## STATEMENT.

THIS action was brought to recover amounts alleged to have been forfeited by the failure of the railway company to furnish cars demanded by the Udall Milling Company for the shipping of freight between Udall and other points in Kansas. In their petition the milling company alleged that they had made eight different applications for cars, which the railway company did not furnish. Based on these refusals, they set forth eight counts in their petition. A demurrer was sustained as to the first, second, seventh and eighth counts, and the case went to trial upon the third, fourth, fifth and sixth counts. In the third count, among other things, it was alleged that on December 29, 1906, a written demand was made for three box cars, each of

---

Milling Co. v. Railway Co.

---

60,000 pounds capacity, for immediate delivery at Udall, to be loaded with grain for Winfield, and that plaintiffs paid the railway company \$22.50, being one-fourth of the freight charged for the cars ordered, and the agent of the company gave them a receipt for that amount stating the purpose for which the receipt was given. It was then alleged that no cars were delivered under the order until February 7, 1907, being a delay of thirty-six days. At that time one car was delivered, another was delivered on the following day, and the third on February 20, 1907, being a delay of forty-nine days on the last car. It was alleged that by reason of these refusals and delay there was a forfeiture of \$121, for which judgment was asked. The remaining three counts were similar to the third, except as to the time of demand for cars and the extent of the delay in furnishing them. In addition to a general denial, and a plea that the third cause of action was barred by the statute of limitations, the railway company alleged:

“That at the various times alleged there was a great congestion and increase of traffic on the line of defendant's railroad which was not and could not reasonably have been anticipated on the part of the defendant. By reason of such increase and congestion of traffic at the times alleged in the petition, it became impossible and impracticable for the defendant to furnish cars and equipment in sufficient number to handle with promptness all the traffic offered to it. The defendant railway company operates many thousand miles of railroad in this and other states, and that the increase and congestion of traffic aforesaid was general over the entire system of railroad operated by defendant. Said increase and congestion of traffic were not confined to the railway system operated by the defendant, but that such condition applied generally to the railroads of the United States, and that by reason thereof it was, at the time alleged in said petition, impossible for defendant to procure cars and engines from other railroad companies, by means whereof it might provide for the traffic on its own line, and that by reason of such increase and congestion of traffic, when cars for through shipments were turned over to other railroads, it be-

---

Milling Co. v. Railway Co.

---

came and was impossible for the defendant to secure a prompt return of the cars and equipment to its own line so as to furnish a prompt service to its own patrons. That long prior to the times alleged in the petition of the plaintiffs, and up to and including said times, the defendant company had sought to secure the purchase and building of cars and equipment, so as to meet every possible requirement, from the various companies engaged in the manufacture and sale of cars and equipment, but that owing to the general increase in traffic and the general demand for cars and equipment it became impossible for it to secure from such companies engaged in the manufacture and sale of cars a sufficient supply of such cars and equipment to meet the full requirements of its traffic. That in so far as it was able, having due regard for the requirements of shippers on other parts of its line and system, defendant furnished plaintiffs and all other shippers their due and proportionate share of cars and equipment. The aforesaid increase and congestion of traffic were due in part to unprecedented crops and to an unusual and unforeseen increase in manufactures and in mining which defendant could not have reasonably anticipated. Prior and up to the time of the aforesaid increase and congestion of traffic, defendant had sufficient cars and equipment to meet the ordinary and usual requirements of its business."

There were averments, too, that under the laws of the United States and of the state the railway company is not permitted to discriminate between shippers, and to have furnished the cars upon the demand of the milling company would have resulted in a discrimination against other patrons of the road. It was also alleged that the reciprocal demurrage act, under which the applications were made, violates the laws and the constitution of the United States so far as it relates to interstate shipments. A trial was had, in which evidence tending to support the allegations of the petition was given. A demurrer to the evidence of the milling company was overruled. The railway company then introduced testimony tending to support the allegations which it had made by way of excusing it from furnish-

---

Milling Co. v. Railway Co.

---

ing the cars demanded, and to show that conditions existed which made the provisions of the reciprocal demurrage act inapplicable to the case. The verdict and judgment were in favor of the milling company, and the railway company has appealed.

*William R. Smith, O. J. Wood, and Alfred A. Scott,*  
for the appellant.

*A. M. Jackson, and A. L. Noble,* for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: The first question arising on the appeal is whether the third cause of action stated in the petition was barred by the statute of limitations. It arises under the reciprocal demurrage act, which provides that if the application of the shipper be for ten cars or less the railway company must furnish them within three days from the time of demand, and that a railway company failing to furnish them within that time shall forfeit \$1 per day for each car it fails to furnish. (Laws 1905, ch. 345; Gen. Stat. 1909, § 7200 *et seq.*) In this case the application for cars was made on December 29, 1906, and hence on January 2, 1907, the railway company was in default. As the liability was a forfeiture imposed by statute, the one-year limitation provided for in subdivision 4 of section 17 of the civil code applies. (*Joyce v. Means*, 41 Kan. 234; *Beadle v. K. C. Ft. S. & M. Rld. Co.*, 48 Kan. 379; *Wey v. Schofield*, 53 Kan. 248.) For the first day of neglect to furnish cars, beginning January 2, 1907, the railway company became liable for a penalty of a dollar on each car, and for every successive day thereafter new penalties were incurred. Each was a distinct liability, on which the statute of limitations began to run at the time it was incurred. As was said in *Colo. Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 515, "when the liability to the penalty is incurred, the creditor's cause of action for its recovery accrues; and the statute is set in motion, and does not stop until the

---

Milling Co. v. Railway Co.

---

action is commenced or barred." (See, also, *The Rector, etc., of Trin. Ch. v. Vanderbilt*, 98 N. Y. 170; *Wells v. Cooper*, 57 Conn. 52; *Atwood v. Lockwood*, 76 Conn. 555; *Patterson v. Wade*, 115 Fed. 770; *State Savings Bank v. Johnson*, 18 Mont. 440; *Town of Londonderry v. Arnold*, 30 Vt. 401; *Hazelton v. Porter*, 17 Colo. App. 1.) The bar had fallen on most of the penalties involved in the third count when the action was commenced, but as to the penalties which had accrued within one year prior to the commencement of the action, of course, a recovery may be had. It is suggested that the ultimate furnishing of the cars by the company in some way tolled the statute. The recognition of the demand for cars or an acknowledgment that compliance with the demand was a duty unperformed did not affect the liabilities already incurred nor arrest the statute of limitations as to them. A written acknowledgment of an existing liability founded on contract will operate to toll the statute, but no such provision is made as to torts or penalties arising from the violation of statutes. The furnishing of the cars stopped the accumulation of new penalties but it did not arrest the running of the statute of limitations on the penalties incurred. It is argued that if a cause of action is deemed to have accrued at the end of each day, that would necessitate a multiplicity of suits growing out of the same transaction, and that therefore all of the violations should be regarded as constituting one comprehensive cause of action. The same point was made in *Wells v. Cooper*, supra, where an action was brought to recover penalties which accrued every month by an officer's neglect to file a certificate in the town clerk's office. It was held that each month's neglect was a complete offense in itself, and that all that were more than one year old were barred by the statute of limitations. It was there contended that the aggregated forfeitures might well be regarded as one and all included in one cause of action. The court responded by saying:

"While we concede the right to recover all the sep-

---

Milling Co. v. Railway Co.

---

arate forfeitures as one sum, yet we must regard the separate forfeiture for each month's neglect as standing by itself in contemplation of the statute, and as cut off by it where one year has elapsed before the bringing of the suit. In order to determine conclusively when the statute begins to run we have only to determine when a suit for the recovery of any forfeiture might be first brought. There can not be any doubt that a suit might be brought at the end of the first month's neglect, and repeated at the end of each subsequent month's neglect. The purpose and efficiency of the statute would be entirely destroyed if this were otherwise." (Page 56.)

Whether or not the penalties may be set up in one count of a petition does not in any way affect the running of the statute of limitations as to those penalties incurred from day to day because of the continued neglect of the railway company. Nor will the furnishing of the cars after the liability has arisen arrest the running of the statute.

The question remains, Did the facts pleaded by the railway company and in support of which it offered testimony except the case from the operation of the reciprocal demurrage statute? It declares "that the provisions of this law shall not apply in cases of strikes, unavoidable accidents, or other public calamity." (Laws 1905, ch. 345, § 10.) The jury were instructed that "in the judgment of the court it has been neither pleaded nor proved in this case that any failure to furnish cars was the result of either strikes, unavoidable accidents, or other public calamity." This was a practical determination of the case in favor of plaintiffs. In the abstract it is stated that there is testimony tending to sustain the allegations of the answer, and in deciding whether there was error in the instructions we need only inquire whether the facts pleaded by the railway company constitute any defense to the plaintiffs' action. Are any of the causes alleged by the railway company for its failure to provide the cars demanded valid or sufficient? The statute was interpreted to

some extent in *Patterson v. Railway Co.*, 77 Kan. 236. The contention there was that the regulations of the statute were so unreasonable and drastic as to transcend the regulating power of the legislature. It was conceded to be competent for the legislature to make regulations requiring railway companies promptly to provide facilities for the speedy transportation of property or persons, but it was held that to be within the police power of the state these regulations must be reasonable. It was recognized that if the statute made absolute requirements with which the carrier could not comply, or which were unreasonable and oppressive, it could not be sustained. To uphold the statute a liberal view was taken of the provision that the carrier should not be liable to penalties for strikes, unavoidable accidents or other public calamities. A Texas statute, from which ours appears to have been taken, provided that the only excuses for failure to furnish cars on demand were strikes or other public calamities. The enforcement of that statute came before the supreme court of the United States, and that court, in holding the statute to be invalid, said:

“An absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state and amounts to a burden upon interstate commerce.” (*Houston & Tex. Cent. Railroad v. Mayes*, 201 U. S. 321, 329.)

To meet just such a contention our legislature broadened the exception and enlarged the excuses for delay or noncompliance with the demands for cars. It added the excuse of “unavoidable accident,” and this term was held to include an undesigned contingency—an abnormal or phenomenal happening—something against which the railway company could not be expected to provide or something causing a delay which a company could not well avoid. So interpreted, the statute was upheld, and but for that view the court must have



---

Milling Co. v. Railway Co.

---

followed the decision in *Houston & Tex. Cent. Railroad v. Mayes*, supra. Referring to the allegations of the answer, the excuses alleged are in effect that there were unprecedented crops in the state and an unexpected increase in the products of the factories and mines, and that there was a congestion of traffic which made it impossible and impracticable for the company promptly to meet the demands for cars. This increase and congestion, it is said, affected other lines in this and other states, so that it was impossible to obtain cars or equipment from other railway companies, and impossible for defendant to procure a return of its own cars which were transported beyond its own line. Now, a large crop is not unusual or phenomenal in Kansas, and hence that may not be a very good excuse. Nor is it easy to understand why the larger products of the mines and factories might not reasonably have been foreseen. It is alleged, however, that the congestion of business was not limited to its own line, but that it was of a character that made it impossible to obtain cars from other sources or to secure a return of its own cars which had gone beyond its own lines. In addition, the company alleged that long prior to that time it had "sought to secure the purchase and building of cars and equipment, so as to meet every possible requirement, from the various companies engaged in the manufacture and sale of cars and equipment, but that owing to the general increase in traffic and the general demand for cars and equipment it became impossible for it to secure from such companies engaged in the manufacture and sale of cars a sufficient supply of such cars and equipment to meet the full requirements of its traffic." In other portions of the answer it is alleged that the company had on hand sufficient cars and equipment to meet the ordinary and usual requirements of its business. Now, if that precaution had been taken and there was a rush and congestion of business which could not reasonably have been anticipated, and it was

---

Milling Co. v. Railway Co.

---

impossible to borrow or buy cars from any source, it would appear that there was a good excuse for non-compliance with the demands. In *Houston & Tex. Cent. Railroad v. Mayes*, 201 U. S. 321, it was said of the Texas statute:

"It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather." (Page 329.)

These things were mentioned as circumstances wholly beyond the control of the company and it was said that an arbitrary infliction of a penalty for an unavoidable delay was unreasonable. It was further remarked:

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements can not provide for, and against which the statute in question makes no allowance." (*Houston & Tex. Cent. Railroad v. Mayes*, 201 U. S. 321, 331.)

It is the duty of a railway company to provide such equipment and cars as will meet not only the ordinary and usual requirements of the traffic but also such increase of traffic and demand for cars as can be reasonably anticipated. If, however, there is a rush of business or a congestion of traffic which could not reasonably have been foreseen, and a delay arises from circumstances wholly beyond the control of the company, it should be regarded as abnormal and such an unavoidable accident as will relieve the company from the

---

Martin v. Garlock.

---

penalties of the act. The averments of the answer, although somewhat general, set up a sufficient excuse and stated a defense under the statute, and the holding of the court to the contrary was material error.

The judgment is therefore reversed and the cause remanded for a new trial.

---

WILLIAM MARTIN, *Appellee*, v. BEN GARLOCK,  
*Appellant*.

No. 16,459.

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Proximate Cause*—*Instructions*. In an action based on the frightening of a horse on the highway by an automobile, in the absence of a request for more definite instructions a charge to the jury that a recovery could be had if the injury was caused by the negligence of the defendant, without contributory negligence on the part of the plaintiff, is not rendered materially erroneous by the omission to state that the negligence complained of must have been the proximate cause and that the injury must have been one reasonably to have been anticipated as a result thereof.
2. DAMAGES—*Exemplary*—*Evidence of Malice*. In such an action evidence that the defendant used language showing a disregard of the plaintiff's rights may be sufficient to show such malice as to warrant the recovery of punitive damages, although the words were spoken after the accident had taken place.

Appeal from Doniphan district court; WILLIAM I. STUART, judge. Opinion filed April 9, 1910. Affirmed.

*S. M. Brewster*, for the appellant.

*J. J. Baker*, for the appellee.

The opinion of the court was delivered by

MASON, J.: A horse ridden by William Martin was frightened by an approaching automobile, driven by Ben Garlock, and ran away, killing itself and injuring

---

Martin v. Garlock.

---

its rider. Martin sued Garlock, claiming that the accident was caused by the failure of the latter to stop when signaled to do so. Garlock claimed that the automobile advanced only ten feet after the signal was given, and that it was not practicable to stop sooner on account of the condition of the road. A jury found for the plaintiff, and the defendant appeals from the judgment.

The verdict was not without support in the evidence and must be deemed to have settled the questions of fact. The jury were instructed in effect that a recovery could be had if the injury was caused by the negligence of the defendant, without contributory negligence on the part of the plaintiff. This instruction is complained of because it omitted to state that the negligence must have been the *proximate* cause, and that the injury must have been one reasonably to have been anticipated as a result thereof. No request was made for any more definite instruction. In volume 29 of the *Cyclopedia of Law and Procedure*, at page 651, it is said: "Failure to instruct that, in order for negligence to create liability, it must be the proximate cause of the injury is reversible error." On the other hand, it is said in volume 6 of *Thompson's Commentaries on the Law of Negligence*, section 7916:

"The question whether the negligence complained of was the *proximate cause* of the injury is *solely for the jury*. It is not required, however, that the attention of the jury should be called to this element in direct terms. Thus, an instruction that, to warrant a recovery by the plaintiff, the jury must find the defendant negligent, and that the plaintiff's injury was caused by such negligence, without contributory negligence on the part of the plaintiff, will cover the ground."

Doubtless where attention is called to the matter the court should refer to the requirement that negligence to be actionable must have been the proximate cause of an injury that was to have been foreseen as a result

---

Holt v. Wilson.

---

thereof, but in the absence of a specific request the omission can not ordinarily be regarded as material error. (11 Encyc. Pl. & Pr. 217.) Possibly the rule might be different where the circumstances naturally suggest the intervention of an independent cause or a difficulty in anticipating the injury. The case of *Maitland v. The Gilbert Paper Co.*, 97 Wis. 476, relied upon by the appellant, appears to have been of that character, but we think the present one is not.

Complaint is also made of the allowance of punitive damages. There was evidence that after the accident the defendant said to the plaintiff: "I don't give a damn for you, or your horse, either." This had some tendency to show malice. When such feeling originated, if it existed, was a question for the jury.

"Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is in general plainly admissible. . . . *Subsequent* hostility is equally receivable; that it arose only subsequently is matter for explanation by the opponent." (1 Wig. Ev. § 396.)

The judgment is affirmed.

---

JOSEPHINE L. HOLT, *Appellee*, v. MARTHA M. WILSON,  
*Appellant*.

No. 16,464.

SYLLABUS BY THE COURT.

1. **WILLS—Construction.** Where one part of a will clearly indicates a disposition in the testator to create an estate in fee it will not be restricted or cut down to any less estate by subsequent vague or doubtful expressions.
2. ——— *Same.* A will contained a provision in these words: "the residue of my estate I hereby give and bequeath to my husband, S. E. G. Holt, during the term of his natural life, and at his decease the residue that may be left after his death, I hereby give and bequeath to my adopted son, William N.

---

Holt v. Wilson.

---

Holt, if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children." *Held*, that this clear devise of the absolute fee of the estate to the adopted son was not cut down to a mere life estate with a vested remainder by the following subsequent language: "but if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs."

3. ——— *Construction—Punctuation.* A rule of construction as applied to wills is that punctuation is not to be regarded if any change therein will render the meaning of the instrument more obvious.

Appeal from Lyon district court; FREDERICK A. MECKEL, judge. Opinion filed April 9, 1910. Affirmed.

*E. N. Evans*, for the appellant.

*L. B. Kellogg*, and *C. M. Kellogg*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff brought this action to quiet title to certain lands in Lyon county, and the sole question involved is the construction of the last will of Eliza Holt, who died on the 15th day of September, 1891. It is only necessary to quote the second paragraph of the will, which reads as follows:

"Second. I direct that all my just debts and funeral expenses be paid as soon as convenient after my decease, and the residue of my estate I hereby give and bequeath to my husband, S. E. G. Holt, during the term of his natural life, and at his decease the residue that may be left after his death, I hereby give and bequeath to my adopted son, William N. Holt, if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children, but if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and

---

---

Holt v. Wilson.

---

in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs. (The intention of this will is to bequeath to William N. Holt, after the first legatee's tenure expires, the whole of my estate, and to his children after his death, but if he should die childless, then the same to go to the said Martha M. Wilson or her heirs.)"

S. E. G. Holt, the husband of Eliza Holt, died on the 22d day of June, 1902, and at the time of his death W. N. Holt, the adopted son named in the will, was living, was married and had one child, a son sixteen years of age. The only question to be determined is, What estate did W. N. Holt take under the will? The trial court held that a fee simple estate of inheritance passed to him by the terms of the will.

The defendant claims, first, that under the will W. N. Holt, upon the death of S. E. G. Holt, took a life estate only, with remainder to his child or children who survived him, and in default of child or children surviving him to the defendant, Martha M. Wilson, or her heirs; second, that if for any reason the foregoing construction be found untenable, then whatever fee W. N. Holt took the same was conditional, restricted and limited, without power of appointment, and not a fee simple estate of inheritance, but subject to limitation over by executory devise in the alternative—that is, to his child or children if any survived him, otherwise to Martha M. Wilson.

In the construction of wills the rule of paramount importance is that the intention of the testator must be gathered from all parts of the will, considered and construed together (*Ernst v. Foster*, 58 Kan. 438, 443), and when ascertained that intention must govern if not in contravention of law or public policy. (*Williams v. McKinney*, 34 Kan. 514.) Aside from this general principle, it is difficult to lay down any hard and fast rule which shall govern in all cases, because it is evi-

dent that each will must be construed by its own language. There are, however, certain well-established principles which must control in determining the question here. One is that where property is devised in fee simple with absolute power of disposal to the first taker, the remainder over is void as a remainder because repugnant to the existence of the preceding fee, and equally void by way of executory devise because the limitation is inconsistent with the express disposition. (4 Kent's Com., 14th ed., p. \*270; *McNutt v. McComb*, 61 Kan. 25; *Jones v. Bacon*, 68 Maine, 34; *Campbell v. Beaumont*, 91 N. Y. 464, 468; *Banzer v. Banzer*, 156 N. Y. 429; 30 A. & E. Encycl. of L. 742.)

In *Jones v. Bacon*, supra, it was said that if property has been devised absolutely, with no restrictions on the gift, the courts will be slow in giving such a construction to subsequent words as will defeat the absolute estate just devised. The rule is also well established that the absolute power of disposition need not be expressly given, if it be necessarily implied by the terms of the will. (4 Kent's Com., 14th ed., p. \*270.)

The present case differs but slightly from that of *McNutt v. McComb*, supra. There the will contained two items. The first was held to create an uncontrolled power of disposition and to vest an estate in fee simple; the second, which contained a direction inconsistent with the absolute interest vested, was held to be void. In this case the two clauses or provisions are not so clearly separated, and for that reason the intention of the testatrix is not so easily gathered from the language of the will as in the case of *McNutt v. McComb*; but we think the intention of the testatrix was to vest an estate in fee simple in W. N. Holt if he was living at the time of her husband's death. He was living at that time, and took an estate of inheritance in fee simple and not a life estate.

The word "heirs" being unnecessary under our statute (Gen. Stat. 1868, ch. 22, § 2; Gen. Stat. 1909,



---

Holt v. Wilson.

---

§ 1651) to create a fee, other words, such as "all my property," "the rest" or "the residue of my estate," will carry an estate of inheritance if not limited by other portions of the will. (30 A. & E. Encycl. of L. 745.)

It will be observed that there are no qualifying words following the devise to W. N. Holt which can be said to limit his right to dispose of the property absolutely. In this respect the will differs from that in *Williams v. McKinney*, 34 Kan. 514, upon which the defendant relies. There the bequest to the wife was "for her sole use and benefit, and for the rearing, nurture and education of my minor children." (Page 517.) An examination of the will in the present case discloses that the testatrix, after bequeathing to her husband a life estate, bequeathed to her adopted son, W. N. Holt, the residue of her estate if he should be living at the time of her husband's death, and provided that in case he died childless without the estate having vested in him the same was to go to Martha M. Wilson or her heirs. The language of the will following the devise of the life estate to her husband reads: "and at his decease the residue that may be left after his death, I hereby give and bequeath to my adopted son, William N. Holt, if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children." If the sentence ended with a period at the word "children" no one would question the application of the rule declared in the case of *McNutt v. McComb*, 61 Kan. 25. But no importance can be attached to the fact that the clause devising the estate to him is separated from what follows by a comma instead of a period. The rule of construction as applied to wills is that the punctuation is not to be regarded if any change in the same will render the meaning of the instrument more obvious. (*Johnson v. First Nat. Bank*, 192 Ill.

---

Holt v. Wilson.

---

541; 1 Redfield, Law of Wills, p. \*433; *Reynolds v. Reynolds*, 65 S. C. 390; 30 A. & E. Encycl. of L. 672.)

There is another rule which applies to this case, which is that "where property is given in clear language *sufficient to convey an absolute fee*, the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions." (2 Underhill, Law of Wills, § 689.) To the same effect are: *McNutt v. McComb*, *supra*; *Safe Deposit Co. v. Stich*, 61 Kan. 474; *Lohmuller v. Mosher*, 74 Kan. 751. Mr. Redfield in the following language states the rule as a qualification of the general rule that the intention of the testator must prevail: "A clearly expressed intention, in one portion of the will, is not to yield to a doubtful construction in any other portion of the instrument." (1 Redfield, Law of Wills, p. \*433.)

A rule slightly more rigid has been adopted by some of the courts. It is thus stated in *Byrnes et al. v. Stillwell et al.*, 103 N. Y. 453: "An estate in fee created by a will can not be cut down or limited by a subsequent claim, unless it is as clear and decisive as the language of the clause which devises the estate" (p. 460), citing *Thornhill v. Hall*, 2 Clark & Fin. (Eng.) 22; *Campbell v. Beaumont*, 91 N. Y. 467; *Freeman v. Coit*, 96 N. Y. 63, 68. The same rule is declared in *Goodwin v. Coddington*, 154 N. Y. 283, 286. Perhaps the rule as stated by Mr. Redfield, *supra*, is the better one. It is the one adopted by the court in *Banzer v. Banzer*, 156 N. Y. 429, and in *Clarke v. Leupp*, 88 N. Y. 228, where it was said:

"It is well settled by a long succession of well-considered cases that when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent

or ambiguous words, inferential in their intent." (Page 231.)

The same principle was applied in *Washbon et al. v. Cope et al.*, 144 N. Y. 287, and in *Benson et al. v. Corbin et al.*, 145 N. Y. 351.

The particular clause of the will under which the defendant claims reads as follows: "but if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs." The direction that in case W. N. Holt died without issue before the death of S. E. G. Holt the estate should pass to Martha M. Wilson or her heirs is in no respect inconsistent with the preceding clause. The repugnancy arises over the use of the words "or after," because, under the preceding clause, upon the death of S. E. G. Holt the fee title passed to W. N. Holt; and that portion of the latter clause which directs that the estate shall pass to Martha M. Wilson or her heirs in case of his death after the estate had already vested in him is, of course, inconsistent with the absolute interest which he took under the first clause, and is therefore void. (*Jackson v. Bull*, 10 Johns. [N. Y.] 18; *Ide v. Ide & al.*, 5 Mass. \*500; *Bowen v. Dean*, 110 Mass. 438; *McNutt v. McComb*, 61 Kan. 25, and cases cited in the opinion.)

As the judgment must be affirmed for the reasons stated, it is not deemed necessary to consider the contention that the clause under which Martha M. Wilson claims is in violation of the law in respect to perpetuities.

The judgment is affirmed.

E. S. MYERS, *Appellee*, v. JOHN SHERTZER *et al.*, a *Partnership, etc.*, *Appellants*.

No. 16,465.

SYLLABUS BY THE COURT.

1. MINES AND MINERALS — *Construction of Lease — Rents and Royalties*. Where an oil-and-gas lease provides (1) that the lessee may terminate the lease at any time "by notice in writing or by surrendering the same and discharging the same of record," and (2) that the lessee shall pay a stipulated rental each year until the royalties derived from the sale of oil and gas shall equal or exceed the rental stipulated, the lessor will be entitled to receive the amount of rent agreed upon as long as the lease remains in force and the royalties received do not equal that amount.
2. — *Rents Accruing Pending Litigation to Cancel the Lease*. In such a case the lessee completed eight producing wells and then sold all the pipes, machinery and appliances by which the plant was operated, and the purchaser proceeded to remove such appliances from the premises. The lessor commenced an action to enjoin such removal and to cancel the lease, but was defeated in the action. The action was pending over a year, during which time the removal was restrained by a temporary order of injunction granted at the commencement of the action. After this litigation ended the lessor brought an action for rent accruing during the pendency of the injunction proceedings, and recovered. *Held*, that the mere fact that the lessor did not succeed in his action for a perpetual injunction and to cancel the lease is not sufficient to defeat his action for rent.

Appeal from Neosho district court; OSCAR FOUST, judge *pro tem*. Opinion filed April 9, 1910. Affirmed.

*John J. Jones*, and *James W. Reid*, for the appellants.  
*H. P. Farrelly*, and *T. R. Evans*, for the appellee.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced March 11, 1907, in the district court of Neosho county, by E. S. Myers, to recover rent claimed to be due under an oil-

82	275
82	714

---

Myers v. Shertzer.

---

and-gas lease. The lease was executed June 20, 1903, and by its provisions was to continue for the term of ten years, unless sooner terminated by the parties under the stipulations provided in the lease for that purpose. One of the provisions of the lease concerning its termination reads:

"Second party shall have the right at any time to terminate this lease by notice in writing or by surrendering the same and discharging the same of record, and shall thereafter be released from all obligations and liabilities under the same.

"In case said party of the second part shall fail to make the payment or perform the covenants hereinbefore set out then this contract, oil-and-gas lease shall be null and void."

The lease was transferred successively by assignment until the appellants became the owners and holders thereof. The lessee and his successors drilled, cased and completed eight oil wells upon the leased premises, all of which produced oil. The appellants, while in possession of the leased premises, which were located in Wilson county, sold the machinery, pipes, pipe lines, tanks, casing and other appliances of the plant to one J. F. McCandlass, who began to remove them and intended to take all the appliances away from the premises. On May 11, 1906, the lessor commenced an action in the district court of Wilson county perpetually to enjoin such removal and to cancel the lease. The petition for the perpetual injunction contained, among other allegations, the following:

"That the said defendant The New Holland Oil & Gas Company, under said lease drilled, completed, cased and equipped eight (8) oil wells on plaintiff's said land described in this petition, all of which said wells are producing oil wells, and under reasonably fair conditions and under reasonably fair management oil may be produced from said wells at a profit.

"That on or about October 1, 1905, the defendant The New Holland Oil & Gas Company, and all of said defendants, abandoned said lease and property, and

---

Myers v. Shertzer.

---

have ever since said time abandoned the same. Pursuant to said abandonment the other said defendants sold to the defendant J. F. McCandlass the power house, pipe, pipe lines, casing and other property and fixtures on said lease, and said McCandlass has been engaged in removing said power plant and surface pipe lines and pipes from said lease for several days and threatens and intends to pull the casing from said wells, which act, if done, will ruin and destroy said wells and will render them valueless, to the great and irreparable injury and damage to this plaintiff, and to the said land, for which said damages the plaintiff has no adequate remedy at law.

"That said defendant J. F. McCandlass is threatening to remove the casing from said wells at once, and will do so unless restrained and enjoined by order of this court from so doing."

To this petition the defendants filed an answer which consisted of a general denial. The court granted a temporary injunction, but on final trial refused to make the order perpetual. The lease contained a provision which reads:

"Said second party shall have the right to erect, lay, maintain and remove all pipe, pipe lines, machinery and structures necessary for the production, transportation and preservation of oil and gas produced on said premises, provided, that said first party shall have the right to purchase any of said pipes, when said second party desires to remove the same, at the cost of new pipe at such time, and in that event said pipe shall not be removed."

Under this clause of the lease the court ascertained the value of the casing and granted a perpetual injunction against its removal, provided the lessor would pay the ascertained value therefor. Further than this the relief prayed for by the plaintiff was denied, and judgment for costs was rendered against him.

The judgment in the action for injunction was entered February 6, 1907, and this action for rent was commenced in Neosho county the 11th of the following March. There is a provision in the lease which reads:

"Said party of the second part agrees to pay said

---

Myers v. Shertzer.

---

party of the first part a rental of two dollars per acre each six months from this date, by depositing the same to the credit of the said E. S. Myers at the National Bank of Chanute, Kansas, on or before the 20th day of June and December, 1903, and on or before the 20th day of June and December of each year thereafter until the royalties derived from the sale of oil or gas from said premises shall equal or exceed said rentals."

There is no controversy about the amount of rent claimed. The contention of the appellants is that no rent whatever should be allowed. The reason for this contention is that at the time the action in Wilson county was commenced no rent was due; that during the pendency of that litigation the appellants were compelled as a matter of self-preservation to contest it or be defeated in the action. This may be true, but if it is it will hardly justify the conclusion contended for by the appellants. The lessee had the right to terminate the lease at any time, which would have ended the duties and liabilities of each party thereunder. By the terms of the lease the lessor had a right to expect the stipulated rent as long as the lease was in force. The lessee failing to terminate the lease as he might have done, the appellee attempted to accomplish this end by the action in Wilson county, which attempt was defeated by the resistance of the appellants. When the lessor saw that the plant of eight producing oil wells was about to be rendered worthless by the removal of the machinery, piping, casing and other appliances by which it was operated, he very naturally took legal steps to protect his rights under the lease, which he had an undoubted right to do. In exercising this right, however, he sought a remedy which the court, after protracted litigation, refused. A man is not bound at his peril to succeed in every legal action he commences. If he acts in good faith and makes a mistake as to his legal rights he satisfies the full legal penalty therefor when he pays the costs adjudged against him. The good faith of the lessor is not disputed.

---

Myers v. Shertzer.

---

The real justification for the resistance of the appellants to the Wilson county action and the refusal to pay rent during the time such litigation was pending is stated in the brief as follows:

"It is contended by the defendant in error that because plaintiffs in error insisted that the lease had not been abandoned, and did not surrender the same of record prior to the decision of that case, that they are estopped from saying that they should not pay the rental. For the plaintiffs in error to have surrendered the lease of record at any time prior to the trial of said cause in Wilson county would have put them in the position of attempting to defend in court in that case the title to property which they had relinquished; for them to have admitted its abandonment in October, 1905, without removing the material would have carried with it the material itself, and they would have been liable in damages to the purchaser of the same, and would have lost the said material and its value. The only thing, then, plaintiffs in error could have done, in view of the allegations of defendant in error's petition in that case, was to contest the suit for abandonment in October, 1905, and go to the expense of seeking to have the restraining order, which was wrongfully issued, set aside."

This statement of the disastrous consequences which would have resulted to the appellants we think somewhat overdrawn. The action in Wilson county was of an equitable nature, being for injunction and to cancel a written contract. The court had complete jurisdiction of the parties and of the subject matter. If the appellants had, instead of a general denial, filed an answer stating fully all the facts involved in the controversy, they could safely have relied upon the court as chancellor to adjust the differences involved so as to do exact and even-handed justice to all parties concerned. Under the circumstances we can not say that the conduct of the lessor was so far wrongful that he ought to be deprived of the rent due under the lease. Doubtless either party might have prevented this long and expensive litigation by a little business diplomacy



---

Lemaster v. Fisher.

---

at the commencement of their difficulties, but they chose to abide by the results of a lawsuit.

We see no error in the judgment of the district court, and it is affirmed.

---

C. A. LEMASTER, *Appellee*, v. JOHN FISHER *et al.*,  
*Appellants*.

No. 16,467.

SYLLABUS BY THE COURT.

**CHattel Mortgages**—*Property to be Kept by Mortgagor at a Certain Place—Removal—Possession.* A stipulation in a chattel mortgage that the property shall be kept by the mortgagor at a certain place gives to him no right to continue in its possession at another place to which it was removed without the knowledge or consent of the mortgagee and contrary to his direction.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed April 9, 1910. Affirmed.

F. A. Waddle, for the appellants.

W. S. Jenks, for the appellee.

The opinion of the court was delivered by

BENSON, J.: This is an action in replevin to recover possession of a piano mortgaged by defendants Tawney and wife to the plaintiff, Lemaster, to secure a note given for purchase money. The answer was a general denial. The mortgage provided that the piano should be kept by the mortgagors at a certain number on a designated street, and that if the "indebtedness shall be deemed insecure" the property might be taken and sold to pay the plaintiff. The building where the piano was kept was owned by the plaintiff's wife, and rented to Tawney. For default in the payment of rent

---

Lemaster v. Fisher.

---

a notice to leave was served, in compliance with which Tawney vacated the premises. At the time of serving the notice to leave the attorney for the owner of the premises, who was also acting for the mortgagee, notified the mortgagors to leave the piano in the building, and that he considered the indebtedness insecure. With the assistance of Fisher the piano was removed to Fisher's home. A demand was then made upon Tawney for the property, which was refused. No demand was made upon Fisher, but he testified that he claimed no interest in the property. Errors are assigned upon the orders overruling an objection to evidence under the petition and a demurrer to the evidence.

The petition was informal and contained unnecessary matter. It did, however, allege that the plaintiff was the special owner of the property under a mortgage, a copy of which was attached; that the defendants, without the knowledge of the plaintiff, removed the property from the place designated in the mortgage; that defendant Fisher "is wrongfully and unjustly detaining in his possession the said goods and chattels from this plaintiff, who is justly entitled to the same, . . . and did so wrongfully detain possession of said goods and chattels for the space of thirty days before the commencement of this action." It was also alleged that "defendants H. W. Tawney and N. Tawney are aiding, counseling and abetting the said John Fisher . . . in wrongfully . . . detaining the said goods and chattels." This stated a cause of action, and there was no error in overruling the objection to evidence. (Cobbey, Replevin, 2d ed., § 453; *Farmers' Bank v. Bank of Glen Elder*, 46 Kan. 376; *Bartlett v. Bank*, 70 Kan. 126; *Laithe v. McDonald*, 7 Kan. 254; Civ. Code, § 140, Gen. Stat. 1901, § 4574; Code 1909, § 581.)

In the absence of a stipulation to the contrary, the mortgagee of personal property has the legal title thereto and the right of possession. (Gen. Stat. 1868, ch. 68, § 15; Gen. Stat. 1909, § 5230.) The only stipu-

---

Lemaster v. Fisher.

---

lation to the contrary in this mortgage is that it shall be kept by the mortgagors at a place described. This implies the right of possession at that place, but gives no right of possession elsewhere, unless consent be given for the removal. The plaintiff was therefore entitled to possession of the property when it was removed without his consent. Whether a demand upon the mortgagor was necessary need not be considered, for there was evidence that a demand had been made.

It is argued that a demand upon Fisher was also necessary as a condition to the maintenance of an action against him. This contention can not be sustained; he claimed no interest in the property, and was only a custodian for Tawney; he had no better right than Tawney, for whom he held the property. The requirements of the statute relating to registry do not apply, for he was not a purchaser. (Gen. Stat. 1868, ch. 68, § 9; Gen. Stat. 1909, § 5224.) He might have been relieved from costs by filing a disclaimer (Civ. Code, § 587; Gen. Stat. 1901, § 5073), or by offering to surrender possession. (Cobbey, Replevin, 2d ed., § 451.)

The debt secured by the mortgage was not due when the action was commenced, and the defendants insist that the plaintiff was not entitled to possession under the insecurity clause, so-called; that the condition is unlike that under consideration in *Werner v. Bergman*, 28 Kan. 60. In that case the condition was that "the mortgagee shall deem himself insecure." (Page 64.) The condition in the mortgage in this case is the same in effect, and no reason is perceived why the rule in the Werner case should not be followed, if it were necessary to uphold the judgment.

The judgment is affirmed.

---

Bank v. Abmeyer.

---

THE FIRST NATIONAL BANK OF HORTON, KANSAS, *Appellee*, v. B. F. ABMEYER, *Appellant*.

No. 16,473.

## SYLLABUS BY THE COURT.

**FRAUD—Pleading—Waiver—Admissions.** In an action to recover upon a promissory note, by an indorsee against the maker, the answer of the maker was that there was fraud in the inception of the note. The plaintiff replied denying "each and all of the allegations in said answer contained which are in any way inconsistent or which deny the allegations in plaintiff's petition." *Held*, that the reply was defective, but as the parties proceeded through two trials as if the reply was sufficient and the fraud alleged in the answer was in issue the defendant is not in a position to insist that the averments of fraud were admitted.

Appeal from Jackson district court; MARSHALL GEPHART, judge. Opinion filed April 9, 1910. Affirmed.

*George H. Whitcomb*, and *Clad Hamilton*, for the appellant.

*A. E. Crane*, *E. D. Woodburn*, and *F. T. Woodburn*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This action was here for review on a former appeal. (*Abmeyer v. Bank*, 76 Kan. 877.) At the second trial the bank assumed the burden of showing that it was the owner of the note in suit. Proof of that kind was offered and the note itself was introduced in evidence. The bank then rested, and, appellant's demurrer to the evidence having been overruled, he declined to produce any testimony, but submitted the case on the evidence introduced on behalf of the bank. An instruction was asked to the effect that when a note has its inception in fraud the burden is upon the indorsee to show that he acquired it for a valuable consideration and without notice of the fraud, but this was refused, and instead the court directed the

---

Bank v. Abmeyer.

---

jury that if they found that the bank was the owner of the note their verdict must be in its favor. A verdict in favor of the bank was returned. The contention is that as the pleadings stood it devolved on the bank to prove that it acquired the note in good faith and without notice of the fraud by which it was alleged to have been obtained. It is argued that the averment in the answer that there was fraud in the inception of the note was admitted by the reply, and hence that no right of recovery was shown. In its petition appellee alleged the execution of the note to the payees, a copy of which was set forth, their transfer of the same to Dunn, and his sale and delivery of it before maturity to appellee. There was an allegation that appellant was indebted for the full face value of the paper, and for that amount judgment was asked. The answer, aside from a general denial, pleaded facts indicating that there was fraud in the inception of the note. The reply denied "each and all of the allegations in said answer contained which are in any way inconsistent or which deny the allegations in plaintiff's petition." The reply can not be regarded as a model method of denying averments of a pleading, but in view of the way the case was tried the character of the reply was not very important. The answer set up the fraudulent acts which, if supported by testimony, would show no liability to appellee, and this in a sense is inconsistent with the averment in the petition that appellant was indebted to appellee for the full face value of the note, but in any view the reply was faulty and vulnerable to any proper attack. In neither trial had there been a motion for judgment on the pleadings, and the sufficiency of the reply had never been questioned. On the first trial appellant offered evidence to prove fraud and proceeded as if it was an issue in the case, and the sufficiency of the reply was not challenged in the second trial. Under the circumstances the appellant is not in a position to insist that the fraud was admitted by the reply.

---

James v. Logan.

---

(*Bashor v. Nordyke & Marmon Co.*, 25 Kan. 222; *St. L. & S. F. Rly. Co. v. Dudgeon*, 28 Kan. 283; *Cooper v. Machine Co.*, 37 Kan. 231.)

It is contended that the action of appellee in assuming the burden of proof in the case was a recognition that the burden was upon it to show also that the note was acquired for a valuable consideration and without notice of the fraud. As the petition did not allege that the transfer of the note to appellee was in writing it devolved on it to show that it was the owner of the note. The burden of proof rested on it to that extent, but when it produced the note and offered testimony of ownership it had shown a *prima facie* right to recover. In the absence of proof of fraud that question was no longer in the case, and hence an instruction on the subject was not warranted.

The judgment is affirmed.

---

V. W. JAMES, as Administrator, etc., Appellant, v.  
EFFIE LOGAN, Appellee.

No. 16,476.

SYLLABUS BY THE COURT.

1. **AFFIDAVITS—Authentication—Jurat.** The statutory certificate for the authentication of depositions can not be used on the ordinary affidavit, and the code of civil procedure prescribes no form of jurat to be appended to affidavits.
2. ——— **Extrinsic Evidence that Oath Was Administered.** If a declaration has in fact been made under oath it is an affidavit, although no jurat be attached. The jurat is merely evidence that an oath was duly administered, and in the absence of a jurat the fact may be proved by evidence *aliunde*.
3. ——— **Attachment—Jurat.** The evidence in this case examined and held sufficient to show that a written declaration used as an attachment affidavit was in fact made under oath, although no jurat appears.
4. **JUDGMENTS—Validity—Collateral Attack.** When a paper pur-

---

James v. Logan.

---

porting to be an affidavit has been approved by the court as such, and has been made the basis of judicial action as if it were duly authenticated, the omission of a jurat is a mere irregularity which will not expose the proceeding to collateral attack.

5. *LIMITATION OF ACTIONS—Recovery of Real Property Sold on Execution.* The five-year statute of limitations against actions for the recovery of real property sold on execution brought by the execution debtor, his heirs or any person claiming under him, by title acquired after the date of the judgment, applies to all sales, void and voidable alike.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed April 9, 1910. Affirmed.

*W. A. S. Bird, and Thomas J. White*, for the appellant.

*James A. Troutman, Robert Stone, and George T. McDermott*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: Sarah A. James undertook to recover the land in controversy from the defendant, Effie Logan, by an action of ejectment. While the action was pending the plaintiff died, and a revivor was had in the name of her administrator. Judgment was rendered for the defendant, and the administrator appeals.

The property formerly belonged to the Enterprise Land, Loan and Investment Company, a foreign corporation. W. E. Fagan sued the investment company, attached the land, and made service by publication. The action proceeded to judgment and the land was ordered sold for its satisfaction. Fagan purchased at a sheriff's sale made under the order, the sale was confirmed, and a sheriff's deed was issued to him which was duly recorded. Afterward Fagan conveyed to the defendant. After the sheriff's deed was recorded the investment company conveyed to Sarah A. James. Her suit was commenced more than five years after the recording of the sheriff's deed. It is said the proceedings

in the attachment case are void for want of jurisdiction, and they must be so or the sheriff's deed is beyond collateral attack. The only defect pointed out is that Fagan's affidavit for attachment bears no jurat. Therefore, it is claimed, the paper was not sworn to and there was no affidavit.

The provision of the code of civil procedure that affidavits are to be authenticated in the same way as depositions, except as provided for the verification of pleadings (Civ. Code, § 345; Gen. Stat. 1901, § 4793; Code 1909, § 336), means, of course, so far as the requirements concerning depositions are applicable. The certificate of the officer need not show that an affidavit was taken at the time and place specified in a notice, as in the case of a deposition (Civ. Code, § 359; Gen. Stat. 1901, § 4807; Code 1909, § 357), because an affidavit is a written declaration made under oath without notice. (Civ. Code, § 341; Gen. Stat. 1901, § 4789; Code 1909, § 347.) There is no requirement that an affidavit shall be written in the presence of the officer and shall be written by the officer, the witness or a disinterested person, as in the case of a deposition (Civ. Code, § 354; Gen. Stat. 1901, § 4802; Code 1909, § 352), and the certificate to an affidavit need not show these facts. In the case of a deposition the witness is first sworn, and after the deposition is written it is subscribed. In the case of an affidavit the oath is administered after the declaration is formulated. The result is that the certificate prescribed for a deposition can not be used on the ordinary affidavit, and no other form is ordained. The remaining section of the statute relating to the authentication of depositions (Civ. Code, § 358; Gen. Stat. 1901, § 4806, Code 1909, § 356) simply provides that the signature and seal of the officer, if he have a seal, are sufficient without additional proof of official character, that signature alone is sufficient if the affidavit be taken in this state and the officer have no seal, but that further proof, the nature of which is indicated, is required if the affidavit be taken in another state and the



---

James v. Logan.

---

officer have no seal. This section, of course, applies to affidavits, but since no special form of jurat is required the statutory definition of an affidavit is satisfied whenever a written declaration is made under oath.

In the case of *Cunningham v. Barr*, 45 Kan. 158, a mechanic's lien statement was held to be properly verified to which the following jurat was appended: "Subscribed and sworn to before me, this September 12, 1887. (Signed) O. A. Harding, Clerk District Court. [Seal.]" (Page 161.) In the case of *Simon v. Stetter*, 25 Kan. 155, a jurat in the same form, but designating the officer simply as "clerk," and bearing no seal at all, was held to be sufficient to authenticate an attachment affidavit, even against a direct attack by motion to discharge the attachment. In the case of *Buckland v. Goit*, 23 Kan. 327, it was held that the entire omission of a jurat did not render an affidavit void. The court said the jurat might be supplied afterward. In the case of *City of Kingman v. Berry*, 40 Kan. 625, it was said:

"The important consideration is whether the complaint was actually sworn to before a proper officer. The mere fact that an officer fails to couple his official title with his name in signing a jurat, or to attach a jurat at all, to the affidavit at the time the oath is administered will not invalidate it." (Page 628.)

These rulings necessarily imply that the certificate of the officer under his signature and seal is merely evidence that the affidavit was duly sworn to, and in *Foreman v. Carter*, 9 Kan. 674, 682, it was said that a challenge of a jurat is not an attack upon what was done but an objection that the proof of what was done is defective. If, therefore, the jurat be missing from an affidavit, if there be no proof on the face of the paper that an oath was duly administered the fact may be established by evidence *aliunde*. This rule is clearly just, because after a party has in fact made or procured to be made the necessary declaration under oath he ought not to be prejudiced and the proceeding ought not to fail in consequence of the officer's neglect to affix a jurat.

In view of the foregoing the question here is, Was Fagan's written declaration made under oath? This question is to be answered from the evidence like any other question of fact. What does the record show?

The affidavit was signed by Fagan, and purports to be an affidavit. It opens with the following statement: "W. E. Fagan, being duly sworn, says:" The document is indorsed on the back: "Attachment affidavit, filed November 7, 1899, A. M. Callaham, Clerk District Court." The appearance docket, which the law requires the clerk to keep, contains the following entry: "November 7, 1899.—Affidavit for attachment sworn to and filed—.35." The clerk's statutory fees for administering an oath were twenty-five cents, and for filing and docketing a paper were ten cents. The clerk issued a writ of attachment, under his signature and the seal of the court, which contains the following recital: "To the sheriff of said county, greeting: Whereas, W. E. Fagan, plaintiff, has this day, on the necessary affidavit being filed," etc. From all this it clearly appears that an affidavit was in fact sworn to according to law.

If the evidence that an oath was duly administered were less conclusive the plaintiff is met by another principle, founded upon justice and wise policy. The journal entry of judgment contains the following recitals:

"And the court further finds that an attachment has been duly issued in said action upon the affidavit of plaintiff and levied upon the following-described real estate. . . . And the court further finds that all the allegations in said affidavit for attachment are true; that the defendant is a nonresident of the state of Kansas, and that said attachment ought to be sustained.

"It is therefore considered by the court that the plaintiff have judgment *in rem* against defendant for said sum of two hundred and thirty-eight and  $\frac{60}{100}$  dollars (\$238.60), and the costs of this action, taxed in the sum of \$—; that said attachment be sustained; that the real estate levied upon under and by virtue of the said order of attachment . . . be sold."

Collateral attacks upon judicial proceedings, made

---

James v. Logan.

---

long after they have been closed, are not favored; and whenever a paper purporting to be an affidavit has been approved as such by the court, and has been made the basis of judicial action as if it were duly authenticated, the omission of the jurat is a mere irregularity which will not vitiate the proceedings.

Numerous cases sustaining the foregoing views are collated in *Turner v. St. John*, 8 N. D. 245. (See, also, 2 Enc. L. & P. 671; 2 Cyc. 26.)

The judgment of the district court must be sustained for another all-sufficient reason. The defendant pleaded the five-year statute of limitations, which reads as follows:

“Actions for the recovery of real property, or for the determination of any adverse claim or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:

“First. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

“Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale.” (Code 1909, § 15.)

The property was sold by order of the court, under a special execution conforming to the judgment. The plaintiff claims under the execution debtor, by title acquired after the date of the judgment. The action was not commenced within five years after the date of the recording of the sheriff's deed. Therefore every condition of the statute is satisfied. The plaintiff argues that the statute does not apply to deeds executed

---

Sellards v. Kirby.

---

pursuant to void judgments. As shown in the case of *O'Keefe v. Behrens*, 73 Kan. 469, wherein the second subdivision of the statute was considered, it has particular reference to such deeds, because if the proceedings were merely irregular and consequently not void they could not be attacked collaterally at all.

The judgment of the district court is affirmed.

---

CORA KIRBY SELLARDS, *Appellee*, v. MARY H. KIRBY, *as Guardian, etc., Appellant*.

No. 16,477.

SYLLABUS BY THE COURT.

1. *WILLS — Devisees — Witnesses — Proof of Execution.* The statute (Gen. Stat. 1909, § 9786) making void a devise or bequest to a witness to a will which can not be proved without his testimony applies only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate.
2. ——— *Separate Sheets of Paper—Identification.* Where a will offered for probate consists of several separate sheets not permanently fastened together, only the last one bearing the signature of the testator, the connection of the subject matter may be sufficient to establish *prima facie* the identity of the other sheets.
3. ——— *Relation of Draftsman to Testator—Undue Influence.* The fact that a will is written by the daughter of the testator, who is named as the executrix, but is not otherwise favored over the other children, does not raise a presumption of undue influence.
4. ——— *Draftsman a Beneficiary—Knowledge of Contents—Independent Advice.* The fact that a will is written by a daughter of the testator, who shares its benefits equally with the other children, does not make a case for the application of the statutory provision (Laws 1905, ch. 528, § 1; Gen. Stat. 1909, § 9787) that a will written by the principal beneficiary, who was the confidential agent or legal adviser of the testator or who occupied any other position of confidence or trust to him, shall not be held valid unless it shall be

---

Sellards v. Kirby.

---

affirmatively shown that the testator knew the contents and had independent advice with reference thereto.

5. ——— *Revocation—Erasure—Signature.* No error appears in the admission to probate of a will, where there was evidence that the testator had duly signed it in ink, below the attestation clause, in the presence of the subscribing witnesses, and a few weeks later had delivered it to the executrix, who retained possession of it until his death, although when it was produced in court the testator's signature had been partially erased by knife scratches, and his name had been written in pencil above the attestation clause, apparently by himself, and no further showing was made as to when, by whom or with what purpose the changes had been made.

Appeal from Osage district court; ROBERT C. HEIZER, judge. Opinion filed April 9, 1910. Affirmed.

*J. H. Stavely*, for the appellant.

*James A. Troutman, Robert Stone, and George T. McDermott*, for the appellee.

The opinion of the court was delivered by

MASON, J.: Probate of the will of Peter Kirby was refused by the probate court, but granted by the district court on appeal, and this proceeding is brought to review that order. The will was written by his oldest child, Mary Kirby Sellards, who was the executrix and a principal beneficiary, on five sheets of paper, which were separate at the time of its execution, but fastened together with a pin when offered for probate, the second and fourth pages being interchanged. The signature of the testator and the witnesses appeared only on the last sheet, and the only direct testimony as to the identity of the others was that of Mrs. Sellards. The opponent of the will contends that the proof in this respect failed by reason of the incompetence of the witness, and also that a presumption of undue influence arose from the relation of the draftsman to the testator.

The statute (Gen. Stat. 1868, ch. 117, § 11; Gen. Stat. 1909, § 9786) provides that "if a devise or bequest be given to a person who is a witness to the will, and the will can not otherwise be proved than by the testimony of such witness, the devise or bequest shall be void, and the witness shall be competent to give testimony of the execution of the will in like manner as if such devise or bequest had not been made." Clearly, however, the words "witness to the will" refer to an attesting witness. This accords with the purpose and history of the legislation. That the statute distinguishes between a witness to the will and one who testifies in its support when it is offered for probate is made apparent by the original language of the succeeding section, providing that "the court shall cause the witnesses to such will, and such other witnesses or any person interested in having the same admitted to probate as may desire, to come before such court." (Gen. Stat. 1868, ch. 117, § 12; Gen. Stat. 1901, § 7948.) Mrs. Sellards was not a witness to the will in such a sense that her competency was affected by her interest. Moreover, her testimony was not necessary to identify the unsigned sheets. As the first four pages happened to end with incomplete sentences, the connection of the subject matter made as effective a union of the several parts as could have been accomplished by their physical attachment. "It is a rudimental principle that a will may be made on distinct papers. . . . It is sufficient that they are connected by their internal sense, by coherence or adaptation of parts." (*Wikoff's Appeal*, 15 Pa. St. 281, 290. See, also, 30 A. & E. Encycl. of L. 580.) The sequence of the pages was indicated by figures placed at the top of each, as well as by the connection of the language, and the fact that they were fastened together in other than the proper order is not important.

A further contention is that the fact that the will was written by the testator's daughter, who was one of

the principal beneficiaries, created a presumption of undue influence, which was not rebutted by any evidence. There is some apparent conflict in the authorities as to the effect to be given to the circumstance that a will is drafted by a legatee. In section 137 of Underhill on the Law of Wills it is said :

“Many cases seem to hold that the circumstance that a party draws a will, . . . under which he takes a legacy, . . . raises a presumption of undue influence exerted by him which must be rebutted by clear and satisfactory evidence. . . . But the safer and more correct statement of the rule is that such a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. . . . It is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected. In some cases it would have no weight at all. Thus, if it appear that the testator had testamentary capacity, that he dictated his will and knew its contents at the date of its execution, and that it was executed in the statutory manner, the mere fact that the will was written by the sole beneficiary would not be enough, unless coupled with other extremely suspicious facts, to overthrow it, or, taken alone, to cast the slightest suspicion upon it.”

What justly creates suspicion is not that the draftsman is a legatee, or even a sole legatee, but that he receives an unreasonable or unnatural benefit. This idea is thus expressed in section 245 of the third edition of Schouler on Wills :

“The circumstance that a party who derives under the will a disproportionate benefit or a benefit to which he had no natural claim is the party who drew it lends disfavor to the instrument, and may turn the scale against its admission to probate. . . . Our later cases appear to rule that wherever the testator’s draftsman or manager of the execution may be thought worthy of some generous token, undue influence and fraud are not to be presumed from the fact that the will gives him a legacy or executorship accordingly.

The extent of his benefit as compared with that of natural objects of one's bounty is a matter of some consequence."

So, also, the suspicion that attaches to a will written by a beneficiary is heightened where he sustains a confidential relation toward the testator. That condition is sometimes said to create an actual presumption against the will. Thus Mr. Underhill says:

"Where it appears from the evidence that the testator and the beneficiary stood in confidential relations toward one another, and it also appears that the legatee . . . was the draughtsman of the will, . . . circumstances are shown from which a presumption of undue influence or fraud arises, which the proponent of the will has the burden of proof to overthrow, and to show that the will was the free and voluntary act of the testator." (1 Underhill, *Law of Wills*, § 145.)

On the other hand a portion of a note in the same work reads:

"The fact that the draughtsman of a will, who is a legatee at the same time, stands in a confidential relation to the testator, does not, in the absence of affirmative proof of fraud or coercion, raise a presumption against the voluntary character of the will." (1 Underhill, *Law of Wills*, note 3 to § 137.)

And the rule is thus stated in volume 29 of the *American and English Encyclopædia of Law*, at page 124:

"Undue influence is not generally presumed in the case of a legacy or devise made by a client in favor of his attorney from the mere relation itself, or from the circumstance that the will was drawn by the attorney; at least where the legacy or devise is not disproportionately large."

Perhaps an unnecessary difficulty is created by an effort to say at just what point the union of a number of suspicious circumstances, no one of which is enough in itself to defeat probate, shall be deemed to give rise to an actual presumption that a will was the result of



---

Sellards v. Kirby.

---

undue influence. The real question in each case is whether all the circumstances so far as shown are such as to lead the court to believe that in fact the will does not actually express the voluntary purpose of the testator. The substance of Kirby's will was that his property was to go to his wife for her life, and then, except for a specific legacy to each of two granddaughters, to his three children. There is nothing in this disposition to suggest any overreaching on the part of Mrs. Sellards. Nor was she shown to have occupied a position of confidence and trust toward her father beyond that arising from their relationship. If it had appeared that she had been intrusted with the general management of his business, or that he was in the habit of deferring to her judgment in his affairs, a different question would be presented. We think that her writing the will created no presumption of undue influence. No question of incapacity or restraint appears to have been raised at the hearing. The controversy turned chiefly upon whether there had been a revocation. But in seeking to counteract evidence in support of the will its opponent introduced affidavits of the attesting witnesses, which had been read in the probate court, stating among other things that when Kirby signed the will he was of sound mind and memory and not under any restraint.

A recent statute makes this provision :

"In all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto." (Laws 1907, ch. 430, § 1; Gen. Stat. 1909, § 9787.)

This rule by its terms relates to actions to contest a

will, but even if extended by interpretation to cover proceedings for its admission to probate the present case would not be affected. The requirement that the testator must be shown to have had independent advice clearly implies that in order to be deemed to occupy a position of confidence or trust to the testator the draftsman must be someone to whom he naturally looks for counsel. That situation does not follow from the mere relationship of daughter and father.

The fact being established that the will had been duly executed, a more difficult question is whether the evidence showed that it had been revoked. The testator, in the presence of the subscribing witnesses, signed it with pen and ink below the attestation clause, and not elsewhere. He kept it in his own possession for a few weeks and then delivered it to the executrix, who retained it until after his death. When she offered it for probate his ink signature had been partly obliterated by means of knife scratches, and his name had been written in pencil just above the attestation clause, either by himself or by someone who closely imitated his handwriting—a matter concerning which the opinions of witnesses differed somewhat. The law permits a will to be revoked “by the testator tearing, canceling, obliterating or destroying the same with the intention of revoking it, by the testator himself, or by some person in his presence or by his direction.” (Gen. Stat. 1868, ch. 117, § 37; Gen. Stat. 1909, § 9814.) In order to accomplish revocation under this provision it is necessary that the testator, with an intention to revoke, cause some physical defacement of the will, adapted to give expression to that purpose. If the other conditions were proved there would be no difficulty in saying that here a sufficient actual defacement was shown, for while the signature was not rendered wholly illegible the partial erasure of it was of such a character as to suggest a purpose to discredit it. Under the English act requiring “burning, tearing or other-

wise destroying," a mere crossing out of the signature, leaving it still legible, is held not to be enough (1 Williams, Executors, 10th ed., pp. 101, 102; 1 Jarman, Wills, 6th ed., p.\*116), but the rule is otherwise where the statute includes the word "canceling." (*Estate of Olmsted*, 122 Cal. 224; *Matter of Hopkins*, 172 N. Y. 360. See, also, *Woodfill et al. v. Patton et al.*, 76 Ind. 575.) Except as already stated, the evidence in this case affords no light as to when, with what purpose or by whom the changes were made. The general rule is that where a mutilated will is found among the testator's effects the presumption arises that the mutilation was his own act, done with a revoking purpose. (1 Underhill, Law of Wills, §§ 231, 232; 1 Redfield, Law of Wills, 3d ed., p. \*307; 30 A. & E. Encycl. of L. 635; 28 Am. St. Rep. 351, note.) Here the will had been out of the possession of the testator for about a year at the time of his death, but as the proponent must be deemed to assert that it was not changed while in her custody the situation is doubtless the same as though it had never left the testator's hands. The partial erasure of the signature is not so unequivocally a cancellation as the running of a pen through it, but would doubtless be sufficient to warrant the application of the rule referred to if it were not for the penciled addition. We must regard this as a genuine signature, for the trial court evidently so treated it, and the evidence supports that view. Doubtless, if the testator erased his first signature intending an unconditional revocation thereby, a subsequent unattested signing could not revive the will. (30 A. & E. Encycl. of L. 657.) But the condition of the instrument affords no presumption that such was the case. In *In the Goods of William King, deceased*, 2 Rob. Ecc. (Eng.) 403, a will was admitted to probate under these circumstances:

"After the death of the testator the will was found with his signature, as at first written, opposite to the center of the attestation clause, erased; but subse-

quently to that erasure the testator's signature was written a short distance beneath the place where the original signature stood." (Page 403.)

The only evidence regarding the change was that it was made after the will was executed and witnessed, and before it was found after the testator's death. The opinion reads:

"The original signature of the deceased has been erased, but by whom and with what motive it is not easy to determine. It is manifest, however, from the facts and circumstances deposed to, that the erasure was not made by the testator *animo revocandi*, as required by the wills act. On that ground, therefore, I decide this case: in the probate the original signature must be restored, and the second signature omitted." (Page 404.)

Citing that case, in section 392 of the third edition of Schouler on Wills the author says:

"If a will should show the testator's signature struck through with a pen and another signature written and left, the natural presumption would be that the original erasure was not made with the intention to revoke at all, but was connected in some way with the final execution by the signature substituted."

In *In re Wood's Will*, 11 N. Y. Supp. 157, a will was admitted to probate which had been found in the testatrix's safe, with the signature erased first by drawing lines over it, and then by nearly erasing such lines and the original signature, but with her name rewritten by her over the erasure. It was not shown when or why the change was made. In the opinion it was said:

"The proponents having proved the due execution of the will, it is entitled to probate, unless the contestants prove its revocation by some one of the modes pointed out by the statute. . . . If the will had been found in her safe, carefully preserved among the valuable papers of the testatrix, with her signature erased, it would have been a fair and reasonable presumption that she erased the signature *animo revocandi*; and it would then be lacking in one of the statutory requirements of a valid will—the signature of the decedent at

---

Sellards v. Kirby.

---

the end thereof. But when found with the signature carefully restored, no such presumption arises. In the absence of all proof, how can I find that it was made with the intent to revoke, when the instrument was preserved by her with her signature carefully restored? An intention to revoke a will not fully consummated is no revocation. . . . It may be that Mrs. Wood drew the lines through her name with the intention of revoking the will, but immediately and before the act was completed, changed her mind, erased the marks, and restored her signature. To sustain the theory of the learned counsel for the contestants, I must find that the erasure was made by the testatrix herself, understandingly, freely, and voluntarily, with no other purpose than to destroy her will, and that it was done at some time previous to the act of rewriting her name, and this finding is asked for in the absence of proof and with the burden resting upon the contestants to establish the fact of revocation." (Page 158.)

In the present case the one fact concerning the testator's intention that is definitely established is that at one time he wished to dispose of his property according to the terms of the will and complied with every requirement of the law to give effect to that desire. What his subsequent purposes were is a matter of speculation. That a few weeks later he delivered the will to the testatrix has some tendency to show that he then regarded it as a valid instrument, although he must already have made the change if he made it at all. In that event, as reasonable a supposition as any is that when he executed the will he failed to notice the space left for his signature above the attestation clause, and therefore inadvertently signed below; that afterward he discovered the inadvertence, and in order to correct it attempted to erase the original signature and affixed the other in the more natural place, intending, not revocation, but ratification. Of course a signing below the attestation clause was sufficient (17 L. R. A., n. s., 354, note), but the testator, on the matter being drawn to his attention, may easily have supposed otherwise. Upon this hypothesis it is not necessary to re-

---

King v. Bellamy.

---

sort to the principle of "dependent relative revocation" to save the will, for the mutilation was without effect unless accompanied by a purpose to revoke. Another way of accounting for the condition of the will seems not unreasonable—the testator may have started to erase his signature, changed his mind before completing the erasure, and then rewritten his name, not as a new execution, but as evidence that he did not intend revocation.

The judgment is affirmed.

---

ALBERT E. KING, *Appellant*, v. EMMA E. BELLAMY  
*et al.*, *Appellees*.

No. 16,482.

SYLLABUS BY THE COURT.

1. TITLE AND OWNERSHIP—*Negotiable Paper Indorsed in Blank—Erasure of Previous Indorsements*. The holder of negotiable paper indorsed in blank is *prima facie* the owner thereof, and the mere erasure of previous indorsements does not destroy this presumption.
2. ——— *Same*. In an action to recover judgment upon a promissory note and to foreclose a mortgage given to secure the payment of such note the mortgage when offered in evidence was indorsed in blank by the payee, but there had been a previous assignment thereon by the payee, which was erased by red lines drawn through it. The court excluded the mortgage unless the plaintiff would first explain the erasure, which he was unable to do, and for want of such evidence his case was dismissed. *Held*, error.

Appeal from Haskell district court; WILLIAM H. THOMPSON, judge. Opinion filed April 9, 1910. Reversed.

Thomas A. Scates, and Albert Watkins, for the appellant.

O. H. Foster, Fred J. Evans, and Edgar Foster, for the appellees.

---

The opinion of the court was delivered by

GRAVES, J.: This action was commenced by the appellant in the district court of Haskell county to recover judgment on a note and to foreclose a mortgage given to secure payment of the note. The Central Loan and Investment Company was the original mortgagee. The appellees now own the land mortgaged. The appellant claims to be the owner and holder of the note and mortgage. The note was assigned in blank. The mortgage appears to have been assigned to Aretta M. Johnson in writing indorsed upon the back of the mortgage and executed by the payee. This assignment was erased by lines drawn with red ink through it. The assignment, however, clearly appears and can be easily read. Afterward it was indorsed in blank by the original payee. The appellant upon the trial offered the note and mortgage in evidence. The mortgage was excluded for the reason that the appellant was unable to explain the erasure of the assignment on the back thereof and show that he was the owner. The appellant having no further evidence to offer, the case was dismissed at his cost and he comes here by appeal. He claims that the note and mortgage were admissible in evidence without preliminary proof, and possession established *prima facie* his right to recover.

We agree with the appellant. It is a well-established general rule that the possession of negotiable paper proves *prima facie* the ownership of the holder. (*Eggan v. Briggs*, 23 Kan. 710; *Challiss v. Wylie*, 35 Kan. 506; *O'Keeffe v. National Bank*, 49 Kan. 347; *Hutchison v. Myers*, 52 Kan. 290; *Anthony v. Brennan*, 74 Kan. 707; 2 Cyc. 239; 8 Cyc. 227; *Kells v. Northwestern Live-Stock Ins. Co.*, 64 Minn. 390.) In the case of *Finney v. Turner*, 10 Mo. 207, it was said:

"The first point in this case is the one presented by the instructions of the court. Allowing the first proposition of the instruction to be correct, in the abstract,

---

King v. Bellamy.

---

yet the latter part, in relation to the burden of proof in case of an erased indorsement, is erroneous, and under the circumstances compelled the plaintiff to take a nonsuit. The mere fact of an erased indorsement appearing on the back of the note does not *per se* prove an actual assignment. There may have been no delivery, or the writing may have been the act of a stranger. . . . The only proof offered of an assignment was the production of the note, with an erased indorsement. No circumstances or facts calculated to throw any suspicion upon the instrument appeared, but upon this alone the court gave the instructions complained of. The rule of law is that everything is presumed to be done rightly until the contrary be proved, and therefore this erasure of itself should not have raised a presumption unfavorable to the holder of the note." (Page 209.)

The case of *Jones v. Berryhill*, 25 Iowa, 289, is to the same effect. In that opinion it was said:

"On the trial defendant objected to the introduction of the note in evidence and also of the notarial certificate of protest. It seems that the payee indorsed the note in blank, and that plaintiff, in sending it to New York for collection, wrote over this indorsement the words, 'pay cashier Chemical National Bank or order,' which latter words were erased when the note was offered in evidence. The objection is that this erasure was not explained. And we ask why should it be? So far as defendant was concerned, plaintiff being the holder, and all the time the real owner, had a right to erase these words and insert his own name, even at the time of trial. *Goddard v. Cunningham*, 6 Iowa, 400; *Pilmer v. Branch State Bank of Des Moines*, 19 Iowa, 112." (Page 293.)

The judgment of the district court is reversed, with direction to proceed in accordance with the view herein expressed.



---

Reese v. Kapp.

---

JOHN B. REESE *et al.*, a Partnership, etc., Appellants,  
V. SAMUEL KAPP, Appellee.

No. 16,483.

SYLLABUS BY THE COURT.

**SALES—Mortgagor of Chattels—Oral Consent of Mortgagee—Legality.** A mortgagor of chattels may, with the oral consent of the mortgagee, make a valid sale of the mortgaged property and convey a good title thereto to a purchaser in good faith, notwithstanding the provisions of chapter 105 of the Laws of 1901 (Gen. Stat. 1909, § 5239), making it a misdemeanor to sell or dispose of mortgaged property without the written consent of the mortgagee.

Appeal from Leavenworth district court; ELI NIRD-  
LINGER, judge *pro tem.* Reversed.

W. B. Brownell, and Arthur M. Jackson, for the  
appellants.

W. W. Hooper, for the appellee.

The opinion of the court was delivered by

BENSON, J.: This action was to recover the purchase money due on a sale of cattle. A counterclaim for damages was interposed by reason of a mortgage on the property. Judgment was given for the defendant, and the plaintiffs, Reese & Son, appeal.

At the time of the sale there was a mortgage outstanding on the cattle, held by a commission firm at Kansas City. When the purchase was made a check for \$1000 was given by the purchaser, and two days later, when the cattle were shipped, a check for the balance, \$5450, was given. Both checks were drawn on the Linwood State Bank. The cattle were shipped from Fall Leaf, Kan., and were consigned to a firm in St. Louis, Mo., for feed at Kansas City, on account of Cole & Ott, under an arrangement by which the cattle might be sold at Kansas City by Cole & Ott with the

---

Reese v. Kapp.

---

permission of the defendant. On arrival at Kansas City the cattle were placed in the pens of Cole & Ott at the stockyards to be fed and watered. About the same time a member of the plaintiffs' firm presented the 1000-dollar check at the bank in Linwood. Previous to shipping the cattle the defendant had drawn a sight draft in favor of the bank on Cole & Ott for \$1000, with which to meet this check, and it appears that he intended to provide for the payment of the other check out of the proceeds of the sale of the cattle; but when the first check was presented he did not have sufficient funds in the bank, and the cashier telephoned to Cole & Ott, inquiring whether the sight draft would be paid. At the request of Cole & Ott the defendant, who was then in their office, answered directing the bank to refuse payment of the checks. The reason given by the defendant at the trial for this order was that he had just been informed of the existence of the mortgage and that he had then stated that he would have nothing more to do with the cattle. The plaintiffs, however, testified that the defendant told them that his reason was that parties who were going in with him would not pay up their share of the money. The mortgagee was immediately notified of the refusal of the bank to pay the 1000-dollar check, and calling up the cashier learned that the 5450-dollar check, which the plaintiffs were about to use to satisfy the mortgage, would not be paid. Thereupon the mortgagee notified Cole & Ott of its mortgage. The defendant then refused to have anything more to do with the cattle, and they were sold by Cole & Ott upon the market with the consent of the mortgagee, the defendant saying that he was done with them. An account of the sale was made by Cole & Ott, reciting that the sale was for account of Samuel Kapp. The proceeds were paid over to the mortgagee, and after deducting the mortgage indebtedness the balance was paid to the plain-

tiffs, who gave the defendant credit for the net proceeds, leaving a balance due to them on the cattle, for which amount this suit was brought.

The plaintiffs' evidence tended to show that the defendant had been informed of the mortgage before the cattle were shipped and that one of the plaintiffs would take the larger check to Kansas City to use in paying it off. The evidence showed that the mortgagee had given oral permission for the sale of the cattle, but the case was submitted to the jury upon the theory that such oral consent was ineffectual, and upon the request of the defendant, and over the objections of the plaintiffs, the jury were instructed that if the cattle were sold by the plaintiffs to the defendant without the written consent of the mortgagee the defendant had the right to stop the payment of the checks; and that if the mortgagee, after satisfying the mortgage, paid over the balance of the money remaining from the proceeds of the sale by Cole & Ott, without reference to the rights of Samuel Kapp, the plaintiffs should be held to have accepted the abandonment of the purchase by the defendant. This instruction was equivalent to a direction to find for the defendant, as there was no claim that any consent in writing had been given and it was not denied that the plaintiffs had received the proceeds. Just what was meant by the expression "without reference to any rights of Samuel Kapp" is not clear, but the statement of the effect of a sale without the written consent of the mortgagee is explicit. The defendant contends that he had the right to rescind the purchase and abandon the cattle at once upon being notified of the mortgage, notwithstanding any oral permission for the sale that may have been given by the mortgagee, and that the instruction was therefore correct. This is contrary to the views of this court in *Frick Co. v. Milling Co.*, 51 Kan. 370. It is insisted, however, that chapter 105 of the Laws of 1901 (Gen.

Stat. 1909, § 5239) makes the consent in writing indispensable. This statute provides that it shall be unlawful to sell mortgaged property without the written consent of the mortgagee, and provides a penalty for its violation, but does not affect the question here presented.

A sale of mortgaged property by the mortgagor with the oral consent of the mortgagee will convey the title as against the latter, notwithstanding the statute. (*Randol v. Buchanan*, 61 Mo. App. 445; *Chase v. Willard*, 67 N. H. 369; *Anderson v. Brewing Co.*, 173 Ill. 213; *White Mountain Bank v. West and Patten & Hamlin, Trustees*, 46 Maine, 15; *Jones Chat. Mort.*, 5th ed., §§ 456, 457; 2 *Cobbey Chat. Mort.* § 637.) If the plaintiffs had the oral permission of the mortgagee to sell the cattle, as the evidence shows, the defendant obtained a good title by his purchase; and if he stopped the payment of the check, which would otherwise have been used to satisfy the mortgage, he can not justly complain of its existence.

The evidence shows that the cattle were sold in Kansas City upon a falling market. The defendant alleged that a higher price could have been obtained in St. Louis, and was allowed under his counterclaim to give evidence of the state of the market in that city, and upon this evidence damages were awarded in favor of the defendant. It is insisted that evidence of market values in St. Louis is immaterial, as the defendant claims to have rescinded the purchase. This question is not fully discussed in the briefs, and may not arise on another trial.

The judgment is reversed and the cause remanded, with directions to grant a new trial.

THE L. A. WATKINS MERCHANDISE COMPANY, *Appellee*,  
V. THE MISSOURI, KANSAS & TEXAS RAILWAY COM-  
PANY, *Appellant*.

No. 16,485.

SYLLABUS BY THE COURT.

1. RAILROADS—*Liability to Shippers for Injury to Goods*. Except as limited by the terms of the bill of lading, the liability of a railway company is for all losses of goods intrusted to it for shipment, except those occasioned by the act of God, the public enemy or the contributing negligence of the shipper.
2. ——— *Notice of Injury and Claim for Damages*. The failure to instruct the jury as to a stipulation in the bill of lading providing that a shipper shall present any claim for loss or damages to the railway company within thirty days after it has been sustained is not a ground for reversal where it appears that the railway company had acquired full knowledge of the loss within a few minutes after it occurred and upon learning the cause of the loss had instituted negotiations to provide for the payment of the same, and where it denied liability for the loss upon other grounds than a lack of demand.

Appeal from Lyon district court; FREDERICK A. MECKEL, judge. Opinion filed April 9, 1910. Affirmed.

*John Madden, W. W. Brown, and L. B. Kellogg*, for the appellant.

*R. M. Hamer, and W. C. Harris*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by the L. A. Watkins Merchandise Company to recover damages from the Missouri, Kansas & Texas Railway Company for the loss of coal tar which the railway company undertook to transport from Emporia, Kan., to Denver, Colo. The tar was lost after it had been loaded in a car and intrusted to the railway company for shipment. On the first trial of the case the district court directed a verdict in favor of the plaintiff, but upon an appeal to this court it was held that there was testi-

---

Watkins v. Railway Co.

---

mony to be weighed and disputes to be settled which required the submission of the case to the jury. The ruling, therefore, taking the case from the jury compelled a reversal of the judgment. (*Railway Co. v. Watkins*, 76 Kan. 813.) On the second trial, and upon testimony substantially similar to that received on the first trial, the jury returned a verdict for the plaintiff. Some of the questions reargued on this appeal were determined by the decision on the first review and are not open to further consideration. There was testimony that the tar was loaded on a car provided by appellee, and was placed on a connecting track of the Missouri, Kansas & Texas Railway Company, when it was in good condition. After the delivery of the car and before the loss the railway company issued a bill of lading, which, among other things, provided that the company should not "be liable for leakage or fermenting of any kinds of liquids, arising from expansion, bursting of packages, or other unavoidable causes." On the first review it was held that in the testimony there was ground for an inference that the loss might have been caused by the defective condition of the tank car furnished by appellee, but whether this was the cause of the loss was a proper question for a jury. In the second trial the inferences were drawn and the deductions were made by the jury, and they made special findings that the car was not an old one and was not in bad condition when it was loaded or when it was accepted for shipment by the railway company. This was a practical determination of the principal question of fact left for disposition in the second trial. On the first trial the railway company filed a demurrer to plaintiff's evidence, which was overruled, and this ruling was approved in the first review. The liability of the railway company, except as limited by the terms of the bill of lading, is for all losses except those occasioned by the act of God, the public enemy or the contributing negligence of the shipper. So far as the appellee is concerned, it is immaterial what the relations

were between the appellant and the Atchison, Topeka & Santa Fe Railway Company, which carried the car from the gas works and placed it on appellant's line, for which the appellant paid that company \$2; nor is it important to inquire at this time whether that company is responsible to appellant for the loss. Appellant is a common carrier and is responsible for the loss of the goods intrusted to it, unless the loss appears to have resulted from one or more of the excepted causes. There is nothing in the testimony which brings the appellant within any of the exceptions to the common-law liability of a common carrier.

There is nothing new or substantial in the objections to testimony, nor is there any good cause to complain of the instructions. There was a stipulation in the bill of lading that any claim which the shipper might have against the railway company on account of loss or damage occurring on its line should be presented within thirty days after the loss or damage was sustained. This provision was evidently intended for the benefit of the railway company, in order that it might inquire into the cause of the loss and its liability therefor. The stipulation is not a material consideration in this case. The railway company had notice of the injury to the tank car and of the resulting leakage within a few minutes after it occurred. The agent of the company inspected the break and had ample opportunity to gain full information as to the condition of the car and the cause of the leakage, and also to use any available means to prevent further loss. The appellee could not have given the railway company any more information than it already possessed. Negotiations were promptly begun by appellant with reference to the claim and with a view of fixing the responsibility for the loss upon the Santa Fe railway company. The officers of appellant seemed to think that it could not shoulder the responsibility upon the Santa Fe railway company until a judgment against appellant had been rendered.

---

Coon v. Railway Co.

---

Appellant did not resist payment because of a lack of demand or notice, but did insist that the loss resulted from the defective car which appellee furnished. This claim was negatived by the jury. The failure to instruct on the matter of a demand is not a ground of reversal. The judgment is affirmed.

GRAVES, J., not sitting.

---

S. A. COON, *Appellee*, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Appellant*.

No. 16,489.

SYLLABUS BY THE COURT.

1. **PERSONAL INJURIES—*Duties of Shippers Accompanying Stock to Look and Listen before Crossing a Track.*** Persons carried on a freight train on which their live stock is in transit, in going to and fro between the caboose and a depot, are not absolved from the duty of looking and listening when about to cross an intervening track, their obligation in that respect being greater than that of persons passing back and forth between a station platform and a passenger train that has stopped to receive and discharge passengers.
2. ——— ***Injury to Passenger on a Freight Train — Contributory Negligence.*** In a personal-injury action against a railway company there was evidence tending to show these facts: The plaintiff accompanied live stock in shipment; he was told to wait at a depot until a train arrived to which his cars were to be attached, and to be ready to take it there at any time; he saw it approaching on a track sixty feet away, and started toward it; in crossing an intervening track he was struck by a switch engine which was running three or four miles an hour, receiving the injury on account of which he sued; a shadow prevented the engine from being visible to him until it had reached a point within forty-five feet of the place of the accident, after which he could have seen it if he had looked, but he failed to do so. *Held*, that whether under the circumstances his failure to look constituted contributory negligence was a question of fact for the jury.



---

Coon v. Railway Co.

---

Appeal from Elk district court; GRANVILLE P. AIKMAN, judge. Opinion filed April 9, 1910. Reversed.

*William R. Smith, O. J. Wood, and Alfred A. Scott,*  
for the appellant.

*Jackson & Darby,* for the appellee.

The opinion of the court was delivered by

MASON, J.: The Atchison, Topeka & Santa Fe Railway Company appeals from a judgment in a personal-injury action brought against it by S. A. Coon. So far as material to the questions of law presented, the facts, according to his testimony and the findings of the jury, were as follow: He accompanied two cars of stock which he shipped from Howard to Kansas City, riding on a drover's pass. At about eight o'clock in the evening he reached Emporia, where his cars were to be attached to a train from the west which had not yet arrived. The conductor told him to wait at the depot, and he did so for more than an hour. He asked the train dispatcher when the train would be along, and was told to look for it at any time and to be there and ready to take it, as it would only wait about a minute. Presently he saw his train approaching and started for the track on which it was running, so as to take the caboose when it should be opposite the depot. This track was sixty feet from the door of the waiting room, and to reach it he had to cross another track, which was about twenty feet nearer. As he was crossing this nearer track he was struck by the tender of a switch engine backing in from the east and received the injuries on account of which he sued. By the light of an arc lamp he could have seen the tender if he had looked toward it after it had reached a point forty-five feet from the place of the accident. Beyond that limit the track was obscured by a shadow. The speed of the engine was not found, and estimates of witnesses varied from three or four miles an hour to as fast as a man could run.

---

Coon v. Railway Co.

---

The questions presented relate to contributory negligence. The principal objection to the judgment is based upon a portion of an instruction reading as follows:

"A passenger in necessarily traveling from a depot to reach his train and who is compelled to cross an intervening railway track belonging to the company over the road of which he is traveling as a passenger, if going the direct route and at the proper time and to take the proper train for him, is not compelled to look or listen before going over the track."

In so charging the jury the trial court applied to the facts of this case the rule declared in *Railway Co. v. McElroy*, 76 Kan. 271, the substance of which is that persons passing back and forth between a depot platform and a passenger train which has stopped to receive and discharge passengers are relieved from the obligation to look for an approaching train before crossing an intervening track. Many courts reject the rule in this form, holding that while a failure to look under such circumstances is not negligence as a matter of law, the jury may decide it to be negligence as a matter of fact. (See notes to the *McElroy* case in 13 L. R. A., n. s., 620, and in 123 Am. St. Rep. 134, 137; also, *Birmingham Ry. L. & P. Co. v. Landrum*, 153 Ala. 192, and *Dieckmann v. Chicago & N. W. Ry. Co.* [Iowa, 1909], 121 N. W. 676.) We are aware of no instance of the application of the rule to passengers on a freight train, and do not think it can properly be so applied. A freight train carries passengers only incidentally. Irregularity is to be expected in the time of its arrival at a station, the duration of its stay and its location during the interval. A person riding upon it for the purpose of caring for stock in transit may justly be required to take precautions for his own safety while going to and from the caboose that are not exacted of one passing between a depot platform and a passenger train.

"It is obvious . . . that the precautions required

of railway companies carrying passengers on freight trains, in affording them safe and convenient means to get on and off such trains, are not the same as those which are demanded in the case of passenger trains." (3 Thomp. Com. on L. of Neg., 2d ed., § 2904.)

If the engine which caused the injury was running at the rate of only three or four miles an hour, there was a considerable interval after it had emerged from the shadow during which by looking in that direction the plaintiff could have seen it before attempting to cross the track. Whether his failure to look at that time constituted negligence was the vital question in the case. By instructing the jury that one in his situation was absolved from the duty of looking, the trial court took this question from them and answered it in the negative. The remainder of the instruction did not in this respect modify the effect of the part already quoted. It read:

"But, nevertheless, it is his duty upon arriving at the track to cross over if there is no apparent danger, and he has no right when knowingly upon such track to linger thereon and neglect to use his judgment and faculties and close his mind and reason to all sense of danger, and if he does carelessly and negligently linger on the track, or carelessly and negligently walk along between the rails, and an injury follows to him by reason of such carelessness and negligence, when if he had used reasonable care he would not have been injured, then in such case he can not recover."

This allowed the jury to find that the plaintiff was chargeable with contributory negligence in having lingered on the track or in having walked between its rails, but not in having failed to look before attempting to cross it.

The railway company also contends that the court should have instructed in substance that if by looking up the track just before attempting to cross it the plaintiff could have seen the approaching engine his failure to do so would bar a recovery. A case might arise in which a passenger on his way to the caboose of

---

Fuqua v. Railroad Co.

---

a freight train would be held to the same requirements that are imposed upon a traveler seeking to cross a railroad at a highway, but we do not think the situation here presented justifies so rigid a rule. The plaintiff's shipping contract contained these provisions, among others, regarding his conduct:

"Will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or across such track or tracks. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, . . . and will therefore not attempt to alight from the caboose or car . . . without first making careful examination . . . and first determine . . . that it is safe to step down."

These agreements serve to illustrate how the attitude of the passengers is affected by the character of the train on which he rides, but we do not perceive that they have a direct bearing upon the plaintiff's obligations under the facts already stated.

The judgment is reversed and a new trial ordered.

---

EDGAR W. FUQUA, *Appellee*, v. THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Appellant*.

No. 16,491.

SYLLABUS BY THE COURT.

1. **PERSONAL INJURIES** — *Measure of Damages* — *Future Disability* — *Pleading*. In an action to recover damages for injury to his person the plaintiff, after sufficiently alleging the negligence of the defendant as the cause of the accident, alleged in his petition that he fell and struck his right side against the edge of the platform of a coach, broke two ribs, and bruised the flesh and lacerated and strained the muscles of his right side; that as a result of such injuries he has suffered intense pain and mental anguish, and still suffers pain and

---

Fuqua v. Railroad Co.

---

mental anguish; that as a result of such injuries he received a severe shock to his nervous system, and ever since has been able to sleep but little; that he has ever since been unable to perform his usual vocation of a traveling salesman, and has been unable to walk or move about without pain and suffering. *Held*, that such allegations are sufficient to present to the jury the question of future disability.

2. ——— *Evidence—Verdict and Judgment.* The evidence in this case is sufficient to sustain the verdict and the judgment.

Appeal from Bourbon district court; JOHN C. CANNON, judge. Opinion filed April 9, 1910. Affirmed.

*W. F. Evans*, and *R. R. Vermilion*, for the appellant.  
*A. M. Keene*, and *E. C. Gates*, for the appellee.

The opinion of the court was delivered by

SMITH, J.: The appellee began this action by filing a petition in which he alleged, in substance, that he went as a passenger aboard the defendant's passenger train in the nighttime, and in going from one coach thereof to another to find a seat he fell between the two coaches and received two broken ribs and other injuries. The petition sufficiently alleged that the accident occurred through the negligence of the defendant and its employees in having the coaches separated by a space of about three feet and by failing to light the platforms. The petition alleged damages in the sum of \$2000, by reason of expenses incurred for doctor's bills and medicine and for loss of time and injuries.

The company filed a motion to require the plaintiff "to state how much damages the plaintiff claims by reason of doctors' bills and medicine, and to whom the doctor bill was incurred, and to state what amount of time the plaintiff claims to have lost by reason of said injuries, and the value thereof, and to state how much damage the plaintiff claims for injury to his person and for pain and mental anguish."

The motion was allowed, and on the order of the

---

---

Fuqua v. Railroad Co.

---

court the plaintiff filed the following amendment to his petition:

"Comes now the said plaintiff, and as an amendment to his petition heretofore filed in said action, and in addition thereto, alleges that the amount of damages said plaintiff claims by reason of doctors' bills and medicine is one hundred (\$100) dollars.

"Plaintiff further alleges that the doctors' bills were incurred to Dr. O. D. Baird, Dr. W. S. Miller, Dr. E. B. Payne, and Dr. R. Aikman.

"Plaintiff further states that the amount of time the plaintiff claims to have lost by reason of said injuries was about six weeks, and the value thereof was about nineteen (\$19) dollars per week.

"Plaintiff further alleges that plaintiff claims damages for injury to his person in the sum of twelve hundred (\$1200) dollars, and for pain and mental anguish in the sum of five hundred (\$500) dollars.

"Wherefore, plaintiff prays judgment as originally asked in his petition."

The defendant in its answer alleged that if the plaintiff was injured as alleged the injury occurred through no fault or neglect of the defendant, but solely by the carelessness and negligence of the plaintiff. The reply was a general denial.

On the trial the jury returned a general verdict in favor of the plaintiff for \$652.50, and answered special questions of fact, among which are the following:

"(1) Ques. If you find a verdict in favor of the plaintiff, how much do you allow him for loss of time? Ans. Fifty dollars.

"(2) Q. How much do you include in your verdict for injury to the person of the plaintiff? A. Five hundred dollars.

"(6) Q. How much do you allow the plaintiff for pain and mental anguish? A. Seventy-five dollars.

"(7) Q. How much do you allow the plaintiff for doctors' bills and medicine? A. Twenty-seven dollars and fifty cents."

The principal contention of the defendant is that "injury to the person of the plaintiff" is not a proper element of damages unless the injury is alleged and proved

to be permanent. If not, the defendant is not in very good position to complain. It asked and received from the court an order requiring the plaintiff to amend his petition to state what damages he claimed on this identical ground. It also on the trial asked and the court gave an instruction to the jury that "this suit was commenced in this court on the first day of April, 1908, and that under the allegations of the petition, and the amendment thereto filed, you can not allow the plaintiff any sum for pain and suffering experienced by him after the said first day of April, 1908." It does not appear that the plaintiff has served upon the defendant any notice stating in what respect he asks a consideration and review of any part of the judgment or of any order of the trial court. (Code 1909, § 578.) Hence this instruction is not before us for review, and must be accepted as the law in this case. We remark, however, that it does not seem to be in accord with the law as declared by this court. (*Townsend v. City of Paola*, 41 Kan. 591; *Edgerton v. O'Neil*, 4 Kan. App. 88. See, also, *Richmond & Danville R. Co. v. Allison*, 86 Ga. 145, 11 L. R. A. 45, and note.)

The company contends that neither the petition nor the evidence justifies the second finding of fact. The plaintiff in his petition alleged:

"That . . . he fell and struck his right side against the edge of the said platform of the south coach, breaking two ribs of plaintiff on the right side of said plaintiff's body, and, so far as plaintiff is able to ascertain, it was what is known as the eighth and tenth ribs on plaintiff's right side. . . . that . . . he bruised the flesh and lacerated and strained the muscles of his right side.

"Plaintiff further alleges that, as a result of said injuries, ever since receiving same he has been unable to perform his usual avocation of traveling salesman, and as a result of said injuries has suffered intense pain and mental anguish, and still suffers pain and anguish as a result of said injuries.

"Plaintiff further alleges that as a result of said injuries he received a severe shock to his nervous system,

---

Fuqua v. Railroad Co.

---

and ever since receiving said injuries has been unable to sleep but little as a result therefrom.

"Plaintiff further alleges that, as a result of said injuries, ever since receiving same he has been unable to walk or move about without pain and suffering to himself."

In *Railroad Co. v. Willey*, 57 Kan. 764, Mr. Chief Justice Doster, speaking for the court, said:

"A party is entitled to recover for all consequences which are the natural and probable result of injuries negligently inflicted upon him by another—that is, for those consequences which the common experience of men justify us in believing will result from an injury, the extent and character of which are known—without specially alleging them as grounds of recovery. Any result following an injury, but beyond the usual and natural consequences flowing therefrom, must be specially alleged, so as to apprise the opposing party of an intention to claim damages therefor." (Page 766.)

In volume 13 of the *Cyclopedia of Law and Procedure*, at page 186, it is said:

"The future effect of an injury, and the pain and suffering which it will presumably cause in the future, need not, if they are the legal result of the injury, be specially averred, but proof thereof is admissible under the general allegation of damages; and an allegation that the plaintiff has not yet recovered from his injuries is sufficient to present to the jury the question of future disability."

Let us review the evidence from the standpoint the jury was required to view it, as limited to April 1, 1908, twenty-six days after the accident. The plaintiff testified:

"Ques. How long were you at home after you came, after your side was hurt? Ans. About six weeks.

"Q. Why were you home at that time, six weeks? A. Why, I was suffering. I could not do any work.

"Q. Why? A. On account of my injuries. I was laid up. I was in bed most of the time.

"Q. How long was it before you got out of the house after you got home? A. About three or four weeks.

"Q. What are the facts with reference to your side



---

Jerrils v. Insurance Co.

---

hurting you at the time you were laid up here at home?  
A. Why, my side hurt me all the time. I could not rest, but was very nervous."

Two doctors also testified that they examined the plaintiff several days after the accident; that one rib was broken, one injured, the side was swollen, bruised and inflamed, and the plaintiff was nervous. The jury had a right also to take into consideration the usual and natural result of the injury. Both the petition and the evidence justified the allowance of \$500 as damages "for injury to the person of the plaintiff," in addition to the other items allowed.

We have examined all the assignments of error and find nothing to justify a reversal of the judgment nor to call for special discussion. The judgment is affirmed.

---

E. W. JERRILS, *Appellee*, v. THE GERMAN AMERICAN  
INSURANCE COMPANY OF NEW YORK, *Appellant*.

No. 16,492.

SYLLABUS BY THE COURT.

1. FIRE INSURANCE—*Appraisers—Failure to Agree—Action on the Policy.* Under a fire-insurance policy providing that in the event of a disagreement as to the amount of the loss each party shall appoint an appraiser and the two appraisers shall select an umpire and appraise the loss, and that no action shall be maintained on the policy until such appraisement has been made, the insured discharges his obligation in that respect when he appoints an appraiser in good faith; and, where the two appraisers fail to agree upon an umpire and the appraisement fails without the fault of the insured, he is not required to propose the selection of other appraisers, but may maintain an action upon the policy.
2. ——— *Pleadings—Admissibility of Evidence.* In an action upon a fire-insurance policy the petition, after alleging the issuance of the policy, the payment of the premium and a loss by fire, alleged due performance of the conditions of the

---

Jerrils v. Insurance Co.

---

policy on the part of the insured. The answer alleged that after the fire occurred a disagreement arose as to the amount of the loss, and that the same had never been ascertained by appraisers, as provided by the policy. The reply was a general denial. *Held*, that under the pleadings it was proper for the plaintiff to show that he appointed an appraiser in good faith and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was made.

Appeal from Chautauqua district court; GRANVILLE P. AIKMAN, judge. Opinion filed April 9, 1910. Affirmed.

*M. A. Fyke*, and *E. L. Snider*, for the appellant.

*S. H. Piper*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: This was an action on a fire-insurance policy. The plaintiff recovered judgment, and the defendant appeals.

The policy covered a stock of merchandise in the town of Elgin. The petition alleged that the stock was destroyed by fire July 31, 1907; that the plaintiff had performed all the requirements and conditions of the policy on his part, and that the defendant refused to pay. The answer set up as a defense that after the fire occurred a disagreement arose between the insured and the company as to the amount of the loss, and that the amount had never been determined by appraisers, as provided by the policy. The reply was a general denial.

On the trial the plaintiff was permitted, over the objections of the defendant, to offer evidence showing that following the disagreement as to the amount of the loss appraisers were appointed, the company and the insured each selecting one appraiser, as provided by the terms of the policy, and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was ever made. The errors com-

plained of are the admission of this testimony and the giving of an instruction to the effect that if appraisers were appointed as the policy provided, and they were unable to agree upon an umpire, the plaintiff had complied with the terms and conditions of the policy respecting appraisal and could recover without showing an award by appraisers. The policy was of the ordinary, standard form, and the provision with respect to appraisal reads as follows:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire, . . . and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The plaintiff's evidence which was admitted over the objections of the defendant was in substance that after the fire occurred an adjuster of the company visited him and a disagreement arose respecting the amount of the loss; that appraisers were then appointed, the company selecting Mr. Warren and the insured selecting Mr. Meeker. When the two appraisers met for the purpose of agreeing upon an umpire Mr. Warren suggested a Mr. Potts, who had been the first choice of the adjuster for appraiser, and also handed to Mr. Meeker a list of persons, one of whom resided at Kansas City, another at Newton, and another at Wagoner, Okla. Mr. Meeker stated to him that on account of the ex-

---

Jerrills v. Insurance Co.

---

pense it would be better to take some one nearer home, and suggested the names of half a dozen merchants living in towns in the same county. The appraiser for the company objected to anyone who lived in the vicinity, on account of local influence. On three separate days the appraisers met and attempted to agree upon an umpire, but being unable to do so the matter was dropped. On the trial the plaintiff introduced in evidence two letters received from the adjuster of the company, after the failure of the appraisers to agree, which stated that the company was ready to select another appraiser in place of Mr. Warren and suggested that the plaintiff appoint someone else to take the place of Mr. Meeker. In these letters the insured was informed that the company would not waive its right to an appraisal.

There are cases holding that where there is a failure of appraisers acting in good faith to agree it is incumbent on the parties to appoint other appraisers. (*Vernon Ins. Co. v. Maitlen*, 158 Ind. 393; *Westenhaver v. Ger.-Am. Ins. Co.*, 113 Iowa, 726.) On the other hand it has been held, on what seems to be the better reasoning, that where the insured has appointed an appraiser, and without his fault the appraisers fail to agree, he may maintain an action. In *Western Assur. Co. v. Decker*, 98 Fed. 381, Judge Caldwell said in the opinion:

"The contention of the company is that when the arbitrators failed to agree it was the duty of the insured to propose a new selection of arbitrators, and that, not having done so, and not having appointed an arbitrator the second time, he can not maintain this action. The terms of the policy are satisfied when the insured, acting in good faith, appoints an appraiser. If the appraisal falls through by disagreement of the appraisers, without any fault of the insured, he has discharged his covenant and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed." (Page 382.)

In the opinion in *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, the court, after referring to cases holding that upon the failure of the appraisers to agree upon an umpire it is the duty of the insured at least to propose the selection of new appraisers, said:

"We are unable to subscribe to this doctrine, so far as the policy upon which the present suit has been brought is concerned. The contract here only requires the parties to choose appraisers once, and not twice." (Page 18.)

In that case it appeared that the appraiser nominated by the company insisted upon the appointment of an umpire living at a great distance from the scene of the loss, and refused without excuse to agree to any umpire named by the other appraiser, and it was said that his conduct amounted to a refusal to proceed with the appraisement and the insured was not required to wait longer before bringing his action. The same doctrine is declared in the following cases: *Hickerson & Co. v. Insurance Companies*, 96 Tenn. 193; *Bishop v. A. Ins. Co.*, 130 N. Y. 488; *Chapman v. Rockford Ins. Co. and others*, 89 Wis. 572; *Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362; *McCullough v. The Phoenix Ins. Co.*, 113 Mo. 606; *Conn. Fire Ins. Co. v. Cohen*, 97 Md. 294; *Brock v. Insurance Co.*, 102 Mich. 583. These are the principal authorities relied upon by the plaintiff in support of the judgment. It will be observed that none of them touches the precise question involved here, since we are not called upon to determine merely whether the conduct of the company or its appraiser in failing to agree upon an umpire rendered it unnecessary that any further steps be taken toward procuring an appraisement. Conceding for the purpose of argument that, since the appraisers had failed to agree, the plaintiff could maintain the action without showing an award, the defendant contends that the pleadings should have set up the facts which avoided the necessity of an award. The whole claim

---

Jerrills v. Insurance Co.

---

of error concerns the pleadings. The contention is that, having alleged full performance of all the conditions and requirements of the policy on his part, the plaintiff offered proof showing facts which rendered performance unnecessary—in other words, a waiver on the part of the defendant of certain conditions and requirements; that, under the pleadings, it was error to admit the testimony; and that, for the same reason, the instruction referred to was erroneous. In support of this contention the defendant relies upon the doctrine of *Insurance Co. v. Johnson*, 47 Kan. 1. There the petition set forth the contract of insurance, payment of premium, destruction of the property by fire, and that the company had refused to pay the loss although the plaintiffs had performed all the conditions of the policy incumbent upon them. The defendant answered alleging a breach of the condition of the policy in regard to encumbrances. The reply was a general denial. On the trial the plaintiffs were permitted to offer proof tending to establish a waiver of the condition of the policy respecting encumbrances, and facts in the nature of an estoppel against the company urging the forfeiture. A judgment against the company was reversed. It was held that there was sufficient testimony produced by the plaintiffs to warrant the instructions given by the court if the acts of waiver and estoppel had been pleaded, but it was also held that “neither the evidence introduced nor the instructions based thereon are warranted under the pleadings as they exist, and before they can be properly received the reply must be amended.” (Page 5.) To the same effect are *Insurance Co. v. Thorp*, 48 Kan. 239, *Gillett v. Insurance Co.*, 53 Kan. 108, and *Insurance Co. v. Coverdale*, 9 Kan. App. 651.

The question resolves itself in its final analysis to this: What were the conditions of the policy which the insured was required to perform in order to entitle him to maintain the action? True, the terms of the

policy contemplated that in case a difference arose respecting the amount of the loss it should be determined by an award of appraisers, but all the policy required the insured to do in case such a disagreement arose was to join with the company in the selection of appraisers. Of course, the insured can not avoid the conditions of the policy by naming an appraiser who acts in bad faith and who refuses without excuse to agree with the other appraiser. Nor, on the other hand, can the company gain any advantage where the failure to agree upon an umpire is occasioned by bad faith or misconduct of its appraiser. We agree with the plaintiff that there was and is no question of waiver in the case. While it would not be inaccurate to say that where the failure of the appraisers to agree upon an award is caused by the bad faith of the appraiser appointed by the company the latter would be estopped from setting up the lack of an award as a ground of forfeiture of the right to maintain the action, still the plaintiff does not rely upon either waiver or estoppel. On the contrary, he relies upon due performance of all the terms and conditions of the policy on his part. Since the policy only required him to appoint an appraiser in case a difference arose as to the amount of the loss, it follows that he has shown due performance when he shows that he has appointed an appraiser. There was no error in the admission of testimony or in giving the instruction.

The judgment is affirmed.

T. H. BEEKMAN, *Appellee*, v. O. B. TROWER *et ux.*,  
*Appellants*.

No. 16,493.

SYLLABUS BY THE COURT.

JUDGMENTS — *Validity — Default — Amendment of Pleadings — Time of Rendition — Vacation.* In an action to foreclose a first mortgage upon real estate the mortgagors and owners of the mortgaged premises and the holder of a junior lien were made parties defendant. The owners of the real estate filed as their answer to the petition a general denial, unverified. Neither the petition nor the answer stated facts which in any manner challenged or affected the interests of the other lienholder, and he did not plead in the action, but made default. Afterward the court permitted the owners of the mortgaged premises to amend their answer by alleging that their codefendant held a warranty deed of the property but it was merely intended as a mortgage, and the debt which it secured had been fully paid and discharged; and they prayed the court to adjudge such deed to be a mortgage and cancel the same. Within six days after the amended answer was filed judgment as prayed for was taken, in the absence and without the knowledge of the holder of such deed. At the time the amended answer was filed and the judgment taken the defendants filing such answer well knew that the debt secured by the deed had not been paid. The holder of the deed then filed a petition stating fully the facts and asked for a new trial. A demurrer to the petition was overruled. *Held*, not error.

Appeal from Wyandotte court of common pleas;  
HUGH J. SMITH, judge. Opinion filed April 9, 1910.  
Affirmed.

W. L. Wood, for the appellants.

L. W. Keplinger, and C. W. Trickett, for the appellee.

The opinion of the court was delivered by

GRAVES, J.: The court of common pleas of Wyandotte county, in an action wherein the Wyandotte State Bank was plaintiff and O. B. Trower, Lillie A. Trower and T. H. Beekman were defendants, rendered judg-



---

*Beekman v. Trower.*

---

ment in favor of the plaintiff against O. B. and Lillie Trower for the sum of \$2000, and foreclosed a mortgage given by them to secure that sum. Defendant Beekman held a warranty deed to the same property, which was executed subsequently to the plaintiff's mortgage and which was given as a mortgage to secure the sum of \$5000. Beekman was a nonresident of the county and was not served with a summons. O. B. and Lillie Trower filed an answer consisting of a general denial, unverified. No mention was made in the petition or answer of the deed held by Beekman. On November 29, 1907, Beekman, by stipulation, entered his voluntary appearance in the case. As neither the petition nor the answer and cross-petition of his codefendants contained any facts which he wished to contest, and as he did not wish to foreclose his warranty deed, he did not file any pleading whatever. On April 22, 1908, O. B. Trower and Lillie A. Trower, by leave of the court but without the knowledge or consent of their codefendant, T. H. Beekman, filed an amended answer and cross-petition, in which they averred in substance that defendant Beekman held a warranty deed to the mortgaged premises which was intended to operate as a mortgage to secure a debt of \$5000; that the debt had been fully paid and discharged, and the deed should be canceled. Six days thereafter a judgment of foreclosure was entered in favor of the plaintiff as prayed for, and also a judgment that the deed held by defendant Beekman was a mortgage and the debt secured thereby had been fully paid and discharged.

On January 25, 1909, Beekman began this action, under section 310 of the civil code (Gen. Stat. 1901, § 4758), to vacate and set aside the judgment so far as it affected him. A demurrer was filed to his petition and was overruled, and from that ruling the Trowers appeal.

The petition contained in substance the facts herein

---

Beekman v. Trower.

---

stated, and also that the Trowers well knew at the time they filed their amended answer and cross-petition, and when the judgment was entered thereon, that the debt secured by the deed held by Beekman was not paid and satisfied, and that the statement made by them to the contrary was false and known by them to be false. A judgment obtained under such circumstances does not seem to be in accord with that honesty and fairness which courts of justice are expected to observe in their proceedings. Under the ordinary rules of pleading, as prescribed by sections 104 and 105 of the civil code (Gen. Stat. 1901, §§ 4538, 4539), Beekman was entitled to ten days after the filing of the amended answer and cross-petition within which to plead thereto, and judgment should not have been entered within that time. It was taken, however, in six days. This was, to say the least, erroneous.

It is claimed that the voluntary appearance of Beekman gave the court jurisdiction of him as fully as if he had been served with a summons, that a defendant served with a summons is bound to take notice of every step taken in the action, and that under this rule Beekman must be held to have known of the filing of the amended answer and cross-petition. In support of this view several decisions are cited, among which are the following: *Kimball and others v. Connor, Starks and others*, 3 Kan. 414; *Curry v. Janicke*, 48 Kan. 168; *Clay v. Hildebrand*, 44 Kan. 481; *Jones v. Standiferd*, 69 Kan. 513; *Shellabarger v. Sexsmith*, 80 Kan. 530. There are other cases cited, but these are the strongest in the list, and they do not seem to sustain the point. The case of *Kimball and others v. Connor, Starks and others*, 3 Kan. 414, was limited and distinguished in the case of *Beecher v. Ireland*, 46 Kan. 97, so that it does not apply to these facts. The general idea running through this line of cases seems to be that while every party is entitled to his day in court, and to have an opportunity to defend and vindicate his rights, he must

when notified that an action is pending against him exercise due diligence to present his claims and wishes in the premises to the court, so that they may be adjudicated. Should he fail to do this when the opportunity is presented, he will be thereafter barred from the privilege. It has been found necessary in the administration of justice to require the exercise of a degree of diligence upon the part of defendants in this respect which in some cases seems harsh and arbitrary, but it is not intended by the application of this rule to deprive any person of a full opportunity to have his rights fully investigated and adjudicated, and every case must be interpreted with this purpose in view. Where an action is commenced to foreclose a lien and several lienholders are made parties defendant, but one or more are omitted, as in the case of *Jones v. Standiferd*, 69 Kan. 513, the defendant owner is chargeable with notice that the omitted lienholders may voluntarily come in or be brought in to assert their liens, and he must therefore anticipate the possibility of such action and be prepared to make such defense thereto as he may desire. Under such circumstances the following language, used in the case of *Kimball and others v. Connor, Starks and others*, 3 Kan. 414, would be proper:

"When the original summons is served the defendants are in court for every purpose connected with the action, and the defendants served are bound to take notice of every step." (Page 431.)

This rule has been modified, however, in several cases where it has been held that a judgment can not be properly entered upon a pleading which has been amended in a material matter, where the adverse party is in default or absent. (*Wm. H. Haight v. Justus Schuck et al.*, 6 Kan. 192; *Alvey v. Wilson*, 9 Kan. 401; *L. L. & G. Rld. Co. v. Van Riper*, 19 Kan. 317; *St. L. & S. F. Rly. Co. v. McReynolds*, 24 Kan. 368.) In the case being considered the cross-petition was amended in a

material matter while the adverse party was absent, in default, and without notice or knowledge of the amendment. Before the amendment was made there was nothing in the pleadings to indicate that the action would affect Beekman's rights in any manner. The effect of the amendment was to deprive him surreptitiously and fraudulently of a secured debt of \$5000. The petition does not characterize the conduct of the Trowers as fraudulent, but uses the milder term of misconduct. The act, however, speaks for itself, and constitutes a flagrant violation of justice and fairness. The claim that such conduct is justifiable under the rules of law administered in courts of justice can not be admitted. Laws intended to facilitate and promote the administration of justice may not be used as instrumentalities of fraud and oppression, and no interpretation of the law which leads to that end can be sanctioned.

When Beekman entered his voluntary appearance he was bound to use due diligence to protect whatever interests he might have in the action. Neither the petition nor the answer, however, suggested any facts which he was called upon to notice. He might have filed a cross-petition and had his warranty deed foreclosed as a second mortgage, but he was under no obligations to do so and he chose to let the opportunity pass. The other parties had filed such pleadings as were presumably satisfactory to them. It was not a case where other lienholders might come in and assert rights inconsistent with Beekman's interest. There was no occasion for him to anticipate the possibility that a contingency might arise in which it would be necessary for him to be present in order to protect his rights, and therefore it can not be said to be a want of due diligence for him to let the action go without further attention. A very different rule would be applied to the Trowers. They were the owners of the land. They knew what liens were upon it, and that all holders of

---

Young v. Railway Co.

---

liens might assert their rights in that action, and due diligence would require them to anticipate such a contingency and be prepared to meet whatever might arise during the progress of the trial. It will be seen, therefore, as illustrated in this action, that the rule of law contended for by the appellants would be fair and just if applied to the owner of the land, but grossly unjust when applied to a party in the situation of Beekman. Misconduct of a party is a very mild term to apply to such a situation, but it is sufficient. It is but fair to say that the attorney for the appellants was not connected with the action in the court below.

The demurrer was properly overruled. The judgment is affirmed.

---

W. T. YOUNG, *a Minor, etc.*, Appellee, v. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

No. 16,499.

SYLLABUS BY THE COURT.

1. PLEADINGS—*Surplusage*—*Notice of Injury by Fellow Servant*—*Nondelegable Duty of the Master*. An allegation in a petition that notice of an injury had been given as required by the fellow servant act (Laws 1907, ch. 281, § 1; Gen. Stat. 1909, § 6999) will be treated as surplusage where the negligence claimed is that of the master failing to exercise proper care in furnishing to the servant a safe place in which to work.
2. ——— *Allegations of Negligence—Definiteness*. The allegations of negligence by which it is claimed that a laborer in a coal mine was injured are examined and found to be sufficiently definite.
3. PERSONAL INJURIES—*Assumption of Risk—Contributory Negligence*. Where the evidence tends to prove that a laborer in a coal mine had become aware of the presence of gas in the room in a mine where he had been directed to work, and made complaint about it, and was then directed to proceed with his work in the same room and was there injured by an explosion of gas, an instruction following the rule given in the second paragraph of the syllabus in *Wurtenberger v. Railway Co.*, 68 Kan. 642, is not erroneous.

---

Young v. Railway Co.

---

4. ——— *Same*. Whether in such a situation the servant, in the exercise of reasonable care for his own safety, knew or ought to have known of the impending danger, and whether it was so obvious that a person of ordinary prudence would not have incurred the risk, were questions for the jury, and there was no error in overruling a demurrer to the evidence.

Appeal from Cherokee district court; CORB A. MC-NEILL, judge. Opinion filed April 9, 1910. Affirmed.

*John Madden, W. W. Brown, and L. B. Kellogg, for the appellant.*

*W. H. Lucas, and J. N. Dunbar, for the appellee.*

The opinion of the court was delivered by

BENSON, J.: This action was brought to recover damages for personal injuries suffered by the plaintiff, Young, while at work mining coal for the defendant company. The negligence charged was the failure to provide proper airways, break-throughs or other necessary means of ventilation, whereby gas was suffered to accumulate in the mine, causing an explosion by which the plaintiff was injured. The plaintiff had worked for the defendant three weeks before the injury, had had three months' previous experience as a coal miner, and was nineteen years of age.

A main entry in the defendant's mine extends north from the shaft. Entries extend to the east from this main entry. From the sixth east entry other entries extend to the north. Three rooms are to the east of the third north entry. No. 1 of these rooms is the one next to the sixth east entry, No. 2 is next north of No. 1, and No. 3 is next north of No. 2. The plaintiff's room was No. 2, and was turned off from No. 3. It did not open into the entry. A track to carry out the coal was laid from the entry into room No. 3, and thence into room No. 2. About two weeks before the explosion the plaintiff told the pit boss that he must have air; that there was no air, and it was a bad place

to work. The pit boss directed him to "go ahead and break it through to Sawyer's," and said: "That place has got to go, and I have n't any other place for you." Sawyer's room was No. 1. The plaintiff had noticed gas in the room, which caused him to make the complaint. He continued his work, and the night before he was injured had put in a shot behind a horseback in his room. The next morning he found that the shot had let down the coal, filling up the hole through the horseback. He proceeded to load the coal into cars upon the track. His uncle, who had been mining in room No. 3, came in and assisted him. Both of them put down their lights from eleven to fifteen feet from the place where they were working, because of gas in the room. While the plaintiff was resting, his uncle in loading coal thrust his shovel through the coal in the opening in the horseback, and thereupon the explosion followed by which the plaintiff was injured.

Four days before the accident the foreman had stopped work in room No. 3 because of lack of air, and requested the plaintiff's uncle, who had been working there, to take the plaintiff's place, which he declined to do. The boss then told him "to gouge around . . . for a day or two," when there would be a place for him. While thus waiting he went in to help the plaintiff, as stated. Unprotected oil lamps were used. The place of the explosion was about forty-five to fifty feet from the entry. There was no other way to supply air, except through room No. 3, the break-through not having been made.

The petition contained an allegation that notice had been given to the company as required by the fellow servant act. A motion to make the petition more definite was overruled, and upon this ruling error is assigned. The allegation with respect to notice, which the defendant argued was indefinite, must be treated as surplusage. The negligence alleged is that of the company. The duty to exercise proper care to furnish

---

Young v. Railway Co.

---

a safe place in which to work is one that can only be satisfied with performance. One of the dangers to be guarded against in mining coal is the accumulation of noxious and explosive gases, and the mine owner is required to provide and maintain ample means of ventilation. (*Schmalstieg v. Coal Co.*, 65 Kan. 753.)

The defendant contends that the petition was also indefinite because the specific acts of negligence were not stated. In addition to the general averment of neglect to provide proper ventilation, airways and break-throughs, it was alleged that the mine was not kept free from noxious standing gas, but that it was continually allowed to accumulate therein, that it was not diluted or made harmless, and that no examination had been made by an examiner or fire boss. The petition was sufficient to show the nature of the plaintiff's claim, and the cause and manner of his injury. (Civ. Code, § 122; Gen. Stat. 1901, § 4556.)

The argument that the name of the officer or agent who had directed the plaintiff to work in the particular place should have been stated is without merit. It was a matter especially within the defendant's knowledge, and it could not have been surprised by evidence that the pit boss or mining boss was the person who had given such directions, for it was within the scope of his duties. He was in the immediate charge of the place.

Complaint is made of the giving of the following instruction:

"Where a master instructs or orders a servant into a situation of danger, and while obeying such order he receives an injury, he will not be held to contributory negligence or with having assumed the risk incident to such work unless the danger was so glaring that a prudent person would not have entered upon it even though ordered by one having authority to order him, and the question as to whether the danger in such an instance was glaring, and so glaring that no prudent man would have encountered it, is a fact to be determined by you by the evidence in this case, the same as any other question of fact."



---

Young v. Railway Co.

---

It is insisted that the facts did not warrant this instruction because there was no promise to correct the defective conditions. The plaintiff was, however, directed to go ahead and break through to the adjoining room, and was working to that end when he was hurt. It must be presumed that the pit boss could estimate the time necessary to comply with his orders, and the failure to give any other directions was equivalent to continuing the order for a reasonable time, or until the object should be accomplished in the usual progress of the work. The instruction is supported by the opinion in *Wurtenberger v. Railway Co.*, 68 Kan. 642, followed in *Railroad Co. v. Norris*, 76 Kan. 836, and was applicable to a phase of the case presented by the evidence.

It is contended that by continuing at work with knowledge of the presence of noxious gases the plaintiff assumed the risk, notwithstanding the order to proceed, and that a demurrer to the evidence should have been sustained for that reason. A servant does not assume the risk of latent or obscure dangers, such as he would not discover by the exercise of ordinary care, having reference to his situation, and such as the master ought to discover by proper inspection. (4 *Thomp. Com. Law of Neg.* § 4641.) In order to devolve upon the servant the assumption of risk he must not only know of the defect but must also know of and appreciate the danger arising therefrom. (4 *Thomp. Com. Law of Neg.* § 4652; case note, 87 *Am. St. Rep.* 557, 583, *e*; *King v. King*, 79 Kan. 584; *Choctaw, Oklahoma & Gulf Rd. Co. v. Jones*, 77 Ark. 367, 4 *L. R. A.*, n. s., 837, and case note.) It has been held, however, that if the danger is so obvious as to be apparent to a person of ordinary intelligence the law will charge the servant with knowledge of the danger. (*Christiansen v. Garver Tank Works*, 223 *Ill.* 142.) Whether the plaintiff in the exercise of proper care for his own safety knew or ought to have known of the impending danger, and whether it was so obvious that a person of ordinary prudence

would not have incurred the risk, were questions properly submitted to the jury. (Case note, 48 L. R. A. 753, 758.)

"It would be a very unjust rule which would allow a master to shield himself from responsibility for the consequences of his own negligence by alleging those acts, not inevitably or imminently dangerous, to have been negligent which his servant performed by his express orders." (*Hawley v. Northern Central Railway Co.*, 82 N. Y. 370, 373.)

It is also argued that the plaintiff was guilty of contributory negligence, but this, too, was a question for the jury. It is true he knew that there was gas in his room, but it was for the jury to determine whether he apprehended or ought to have apprehended disaster therefrom, and whether he exercised due care in the circumstances in which he was placed. The evidence was sufficient to sustain the finding that the company had failed to exercise proper care to make the place safe, and had neglected to provide for ventilation and to make inspection, as required by the statute. (Gen. Stat. 1909, ch. 79; 26 Cyc. 1203; case note, 87 Am. St. Rep. 557.) The beneficent objects which the statute was designed to secure are stated in *Schmalstieg v. Coal Co.*, 65 Kan. 753, where it was held that the act provides additional safeguards for the laborer, and does not take away from him any protection given by the common law.

The case was fairly submitted to the jury, and the verdict is supported by competent evidence. No error is shown, and the judgment is affirmed.

---

Garrett v. Minard.

---

THE GARRETT BIBLICAL INSTITUTE, *Appellant*, v.  
HENRY C. MINARD, *Appellee*.

No. 16,501.

## SYLLABUS BY THE COURT.

1. JUDGMENTS—*Default—Notice—Res Judicata*. A judgment by default, based on actual notice to the defendant, is as conclusive against him upon every matter admitted by the default as if he had personally appeared and contested the plaintiff's right of recovery.
2. ——— *Vacation—Fraud Must be Collateral and Extrinsic to Issue Involved*. While a judgment may be vacated and a new trial had "for fraud practiced by the successful party in obtaining it," it is such fraud as is collateral and extrinsic to the issues involved in the action and on which the judgment was founded, and hence a party against whom a judgment by default was rendered is not entitled to have the judgment set aside and the issues retried because the allegations in plaintiff's petition, which constitute the merits of the case, are alleged to be untrue.

Appeal from Bourbon district court; WALTER L. SIMONS, judge. Opinion filed April 9, 1910. Affirmed.

A. M. Keene, and E. C. Gates, for the appellant.

W. P. Dillard, and W. W. Padgett, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: On March 3, 1906, Henry C. Minard instituted an action against Robert Fowler and the Garrett Biblical Institute to recover a tract of land. Personal service was obtained on Fowler, and constructive service upon the institute. No answer was filed by either defendant, and on June 6, 1906, judgment by default was entered deciding that Minard was the owner of the land and awarding him possession of the same. On September 7, 1906, the institute applied to the court to open up the judgment and allow it to make a defense, alleging that it never had actual notice of the case nor opportunity to defend against it.

---

Garrett v. Minard.

---

A hearing was had upon the application, wherein it was shown and found that the institute really had actual notice of the pendency of the action, and upon appeal this finding was affirmed. (*Garrett v. Minard*, 79 Kan. 470.) After the refusal to reopen the judgment the institute brought the present action, alleging again that it had not been duly summoned in the ejectment action and had no actual notice or knowledge of its pendency. It also alleged that Minard had no ownership or interest in the land when that action was begun or decided, and that the allegations in his petition as to ownership, upon which judgment was founded, were wholly false and known by him to be false when they were made, and that the court was thereby misled and the judgment in favor of Minard fraudulently obtained. Issues were joined on these averments of the petition, and upon a trial were rightly decided in favor of Minard. The judgment by default, based as it was on legal notice, was as conclusive against the institute upon every matter admitted by the default as any other kind of judgment could have been. (*Johnson v. Jones*, 58 Kan. 745.) The claim that the institute did not have actual notice of the pendency of the ejectment action was adjudicated against it upon the application to reopen the judgment. On that hearing it had full opportunity to prove this claim, but there was a finding, based on sufficient testimony, that it had actual notice of the action and a fair chance to defend against it. The question was foreclosed by the decision in *Garrett v. Minard*, supra.

There is a further contention by appellant that the judgment in ejectment should be annulled because the allegations of Minard in his petition were untrue. The truth of these averments was directly involved in the ejectment action and was determined by the judgment in that case. The code permits the setting aside of a judgment for fraud in obtaining it—that is, fraud extrinsic or collateral to the issues tried and decided—

but the falsity of the things alleged or proven which constitute the merits of the case and the basis of the judgment affords no reason for reopening and retrying the case. This was directly adjudged in a case where a party attempted to escape the binding force of a default judgment. (*Loan Co. v. Marks*, 59 Kan. 230.) In that case, as in this, the judgment was attacked on the ground that the averments in plaintiff's petition as to the title of land were false. After stating that the effect of a default is to admit the truth of the averments of the petition, it was said:

"The contention in this case has been, and now is, that the averments in the petition of Caroline Matthews with reference to title were false. Marks now denies that which by his default Dolloff admitted. The very object and purpose of judicial proceedings is to determine the truth or falsity of the allegations of fact of the parties to controversies in the courts, as well as their rights under the law applicable to the facts as finally found. When summoned in an action, the defendant is called on to challenge the truth of any statement of fact which he denies, and the correctness of any claim of right under the law applicable to the facts alleged. If it should be held that a judgment by default is binding only when based on a truthful pleading, there would be very little advantage in making any appearance in actions relating to land unless some present right to use the property should be threatened; for nothing would be lost by the default, and the same defense could be made at any time thereafter." (Page 233.)

The same question was considered at length and supporting authorities cited in *Plaster Co. v. Blue Rapids Township*, 81 Kan. 730. The view adopted there was that when a party has been summoned into court and has had an opportunity to contest an issue which goes into judgment, whether he avails himself of the opportunity or not he is not entitled to have the judgment set aside and be granted another trial of the same issues merely because the facts alleged in the

---

Bressler v. McVey.

---

petition or the testimony offered and upon which the judgment is founded are untrue. There would be no finality in a judgment and no end of litigation if the contrary view were taken. It was stated as a general rule "that an act for which a court of equity will set aside or annul a judgment between the same parties, rendered by a court of competent jurisdiction, has relation to fraud extrinsic or collateral to the matter tried by the first court, not to fraud in the matter on which the judgment was rendered. By the expression 'extrinsic or collateral fraud' is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy." (*Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, 735. See, also, *McCormick v. McCormick*, ante, p. 31.)

The judgment of the district court is affirmed.

---

G. W. BRESSLER, *Appellee*, v. GEORGE MCVEY,  
*Appellant*.

No. 16,503.

SYLLABUS BY THE COURT.

**VERDICT**—*Contrary to the Evidence—Excessive or Inadequate Award.* Where the sole question submitted to a jury is whether the plaintiff is entitled to recover upon a contract, and there is no dispute concerning the amount nor any basis for a finding that the defendant owes a less sum than that claimed, a verdict for half the amount should not be received, and if received should be set aside as contrary to the evidence at the instance of either party.

Appeal from Norton district court; WILLIAM H. PRATT, judge. Opinion filed April 9, 1910. Reversed.

*J. R. Hamilton*, for the appellant.

*L. H. Thompson*, for the appellee.

The opinion of the court was delivered by

MASON, J.: G. W. Bressler sued George McVey for a real-estate broker's commission. He asserted that a contract had been made by which if he found a purchaser he was to receive whatever the property brought in excess of \$7000; that he had procured a customer ready and able to take it at \$7500, but that the defendant, without just cause, refused to convey. While the answer was a general denial, the defense developed at the trial was that the plaintiff's agency was not exclusive, and that before his negotiations culminated a sale had been made to another buyer. There was no dispute as to the amount of the commission—the only controversy was whether it had been earned. The jury, however, returned a verdict for the plaintiff for \$250, upon which judgment was rendered, from which the defendant appeals.

The appellant claims that the judgment should not stand because it is contrary to the evidence, inasmuch as, whatever view may have been taken of the conflicting testimony, the plaintiff was entitled to \$500 or to nothing at all. The appellee seeks to answer this contention by saying that a party can not complain that a judgment against him is too small. That, however, is not the ground of the appellant's complaint. He finds fault with the judgment, not because it is not large enough, but because it rests upon a verdict utterly without support in the evidence. If the verdict could be construed as a finding in favor of the plaintiff it would support a judgment not merely for \$250, but for \$500. But it is no more for him than against him. If the jury believed his story they were bound to render a verdict for the full amount. In deciding that he was not entitled to \$500 they in effect refused to accept his version of the matter. The case was not one where by discrediting a portion of his testimony his claim could be allowed in part, nor was there room for

error in computation or for misapprehension in estimating the amount of recovery. The only question submitted to the jury was, Did the plaintiff earn his commission? The process by which the verdict was arrived at is perfectly obvious. If the plaintiff testified truly, the defendant owed him \$500; if not, there was no indebtedness. The jury were called upon to determine which condition existed, but instead of doing so they assumed to settle the controversy by allowing one-half of the claim and disallowing the other half, no doubt with the idea that "splitting the difference" was a fair method of compromising the dispute. But in this they mistook their function. Each litigant, the defendant no less than the plaintiff, was entitled to an answer to the question the jury were impaneled to determine.

"Where the verdict which the jury return can not be justified upon any hypothesis presented by the evidence, it ought obviously to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for \$100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for \$50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume, in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim." (2 Thomp. Trials, § 2606.)

The court has undoubted power to refuse to accept a verdict rendered under such circumstances. (*Hines v. Royce*, 127 Mo. App. 718; *Chandler v. Hinds*, 135 Wis. 43.) If it is received it should be set aside at the instance of either party, as contrary to the evidence. The plaintiff's right to demand this is recognized in recent decisions of this court. (*Thompson v. Burtis*, 65 Kan. 674; *Miller v. Miller*, 81 Kan. 397.) The defendant's right is equally clear in reason, and is sup-



ported by decisions in other jurisdictions. A typical case is *Metz v. Campbell Printing-Press & Manuf'g Co.*, 32 N. Y. Supp. 155, where it was said:

"The only issue created by the pleadings was with regard to the making of the alleged agreement. . . . No other issue was litigated upon the trial, . . . and the only question submitted by the learned trial judge to the jury was whether or not the alleged agreement was made. . . . Upon the pleadings and the evidence, the verdict should have been either for the plaintiff in the amount claimed or for the defendant. The jury might well, upon the conflict of evidence which ensued upon the trial, have found either way; but they could not with consistency find both ways. A verdict which repudiated the alleged agreement, and yet awarded any recovery to the plaintiff, was manifestly unjust to the defendant." (Page 156.)

Of precisely the same character are *Fuld v. Kahn*, 24 N. Y. Supp. 558, and *Pionier v. Alexander*, 28 N. Y. Supp. 157. In *Benedict v. Beef & Provision Co.*, 115 Mich. 527, the chief justice said:

"The jury were . . . bound . . . to give plaintiff the entire amount of this claim or to reject it entirely. It is, however, urged that, since the jury have found that the contract was as claimed by plaintiff, and have fixed the amount at less than that to which he testified, the defendant is not prejudiced. Every litigant is entitled to have the verdict against him based upon evidence. . . . A litigant is always prejudiced when he can point to the record and say there is no tangible evidence to support the verdict." (Pages 529, 530.)

The other members of the court took a different view of the evidence, but said that "there is no doubt that, where the record is such as to make it clear that the jury have reached the result by 'splitting differences,' neither party has had the benefit of their judgment, and such verdict ought not to be permitted to stand." (Page 530.)

Other objections are made to the judgment, but they are not regarded as substantial. The judgment is reversed and a new trial ordered.

THE GARDEN CITY, GULF & NORTHERN RAILROAD COMPANY, *Plaintiff*, v. JAMES M. NATION, *as Auditor, etc., Defendant*.

No. 16,988.

SYLLABUS BY THE COURT.

1. MUNICIPAL BONDS — *Aid of Railroads — Authority*. Section 7049 of the General Statutes of 1909 (Laws 1907, ch. 286, § 1) is not repugnant to section 8 of article 11 of the state constitution.
2. ——— *Registration—Duty of Auditor of State*. It is the duty of the auditor of state, upon presentation for that purpose, to register and certify bonds issued under the above act if he is satisfied that such bonds have been issued in accordance with the provisions of the act and that the signatures thereto of the officers signing the same are genuine.
3. ——— *Showing of Expenditures by Railroad Not a Prerequisite to Registration of Bonds*. As a prerequisite to registering such bonds the auditor of state is not authorized to require a showing that the holder of the bonds has expended a sum of money equal in amount to the face value of the bonds for land to be used for right of way, depot grounds and terminal facilities in the city which issued the bonds.

Original proceeding in mandamus. Opinion filed April 9, 1910. Peremptory writ allowed.

*Albert Hoskinson, Edgar Roberts, and A. M. Harvey*, for the plaintiff.

*Fred S. Jackson*, attorney-general, and *Charles D. Shukers*, special assistant attorney-general, for the defendant.

The opinion of the court was delivered by

SMITH, J.: This is an original action in mandamus to require the state auditor to record in his office certain bonds of the city of Garden City in aid of the railroad company. The bonds purport to have been issued under authority of chapter 286 of the Laws of 1907. (Gen. Stat. 1909, §§ 7049, 7053.) The bonds, apparently issued in due form, were presented for regis-

---

Railroad Co. v. Nation.

---

tration to the state auditor, who refused the registry for the following reasons: (1) That chapter 286 of the Laws of 1907, and the acts supplemental thereto, are unconstitutional. (2) That there is no statute making it the duty of the auditor to register such bonds. (3) That the plaintiff has made no showing to the auditor that it has expended a sum of money equal to the face value of the bonds for land which is to be used for a right of way, depot grounds and terminal facilities in Garden City. It is contended on the one side that each of these objections is good, and upon the other that none of them is good. They will be considered in order.

(1) The defendant asks to reopen the question of the constitutionality of the statute authorizing cities and municipalities to issue bonds in aid of railroads. It is said that such cities and municipalities are but subordinate branches of the state government, and the state can not authorize such branches to do what the state itself can not do, viz., "be a party in carrying on any works of internal improvements." (Const., art. 11, § 8.) The whole question, it is practically conceded, was thrashed out in the opinion by Mr. Justice Valentine in *Leavenworth County v. Miller*, 7 Kan. 479, on one side thereof, and in the dissenting opinion of Mr. Justice Brewer in *The State, ex rel., v. Nemaha County*, 7 Kan. 542, on the other side. In the same volume is another decision, *Morris v. Morris County*, 7 Kan. 576, which reaffirms the two former decisions adverse to the very impressive argument of Mr. Justice Brewer. The statute under which these decisions were made is chapter 12 of the Laws of 1865, which provides in part:

"SECTION 1. That the board of county commissioners of any county, to, into, through, from, or near which, whether in this or any other state any railroad is or may be located, may subscribe to the capital stocks of any such railroad corporation, in the name and for the benefit of such county, not exceeding in amount the sum of three hundred thousand dollars in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment for

---

Railroad Co. v. Nation.

---

said stocks: . . . But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the board of county commissioners."

Omitting the provisions relating to the conditions under which aid may be extended under the statute in question in this case, section 7049 of the General Statutes of 1909 (Laws 1907, ch. 286, § 1) provides:

"When a petition in writing, signed by at least two-fifths of the resident taxpayers of any incorporated city of the first or second class, shall be presented to the mayor and council of such city, asking that a vote be taken and an election held upon the question of aiding any railroad company, whether operated by steam, electricity, or other motive power, constructing or proposing to construct its line of railroad in or through said city, in securing or paying for land for right of way, depot grounds and terminal facilities, the mayor and council of such city shall cause an election to be held to determine whether such city shall aid such railroad company in securing and paying for lands for the right of way, depot grounds and terminal facilities; provided, that . . . no city of the second class shall extend aid under this act to any railroad company to a greater amount than twenty thousand dollars; provided, that aid shall not be extended to any railroad under this act which has received aid from the same city under any former act."

Section 7053 of the General Statutes of 1909 (Laws 1907, ch. 286, § 2) provides in part:

"If a majority of the qualified electors voting at such election shall vote for extending such aid, the mayor and council, for and in behalf of such city, shall cause the bonds of such city, to the amount specified in such petition, to be issued and delivered to such railroad company. . . . Provided, that no such bonds shall be issued until the railroad to which it is proposed to extend aid for the purposes hereinbefore indicated shall be completed and in operation through the city voting in favor of such aid and the issuance of such bonds, or to, from or between such points in such city as may be specified in the proposition set forth in the petition required by this act."

It is virtually conceded in the argument that, if the legislature of the state may authorize a county to aid in the construction of a railroad, the legislature may also authorize a city to extend such aid. Nor is it contended that the statute authorizing a county to subscribe for bonds of a railroad company to aid it differs in principle from the statute authorizing cities to donate aid to the railroad company, probably because in effect the former results in a donation as effectually as does the latter provision. The question involved in this case is the same as the question involved in the cases previously cited. In the dissenting opinion of Mr. Justice Brewer in *The State, ex rel., v. Nemaha County*, 7 Kan. 542, he said:

"While I concede that the great weight of authorities—looking at it simply in the light of majorities—is with my brethren, yet there has ever been a vigorous and earnest dissenting. The question will not remain settled. Like Banquo's ghost, 'it will not down.' While the earlier cases do not discuss the question in the light of the principles upon which such legislative action must be based, there has been, ever since, great sheltering behind the accumulating authorities. 'Whatever is, is right,' is practically the idea upon which the late decisions rest. Because *so many* legislatures, *so many* executives, and *so many* courts have recognized this species of legislation, it must be valid. If that be the rule universally adopted, accumulating wrong will never be disturbed in its illegally acquired power.

"But it is said that this question has already been settled in this court, and the maxim *stare decisis* is invoked in its behalf. I recognize the binding obligation of that maxim, and if the question had once been fully considered and determined in this court, I should have no desire to reëxamine it." (Page 550.)

Nothing new has been added to the argument made by Mr. Justice Brewer in that decision, if indeed anything new can be added thereto, and after fully considering that learned protest this court decided that the statute was not in violation of section 8 of article 11 of the constitution of the state. The bar, the courts and

the people of the state, with practical unanimity, have accepted the construction of the constitutional provision thus made nearly forty years ago. Even in such cases as *C. K. & N. Rly. Co. v. City of Manhattan*, 45 Kan. 419, where a reverse construction would have been a complete defense, the question was not even suggested.

The defendant cites *The State v. Kelley*, 71 Kan. 811, and *City of Geneseo v. Gas Co.*, 55 Kan. 358, as authority for his contention that the statute is unconstitutional. There is so little analogy, however, in principle between those cases and the case at bar that it seems hardly necessary to distinguish them. In the case of *The State v. Kelley* the statute clearly authorized the state to be a "party in carrying on a work of internal improvement." (Syllabus.) In *City of Geneseo v. Gas Co.*, the statute involved was entitled "An act authorizing counties and unincorporated cities of the second and third class to encourage the development of the coal, natural gas and other resources of their localities by subscribing to the stock of companies organized for such purposes." (Syllabus.) In the opinion Mr. Justice Allen, after recognizing the validity of statutes authorizing cities to provide for lighting the streets and other public purposes, said:

"This corporation, however, seems to be formed for the purpose of carrying on the business of mining gas, coal, oil, salt and other minerals. It is not formed merely to supply a public need of the city, but contemplates carrying on a private business for profit. The main purpose of the corporation would seem to be to produce minerals for sale on the market at a profit. Cities are organized for public purposes, not to enter into private business ventures." (Page 361.)

Paraphrasing the language of Mr. Justice Brewer, we recognize the binding obligation of the maxim *stare decisis*, and since the question here involved has once been fully considered and determined in this court we have no desire to reëxamine it, but in accord with the former decisions of this court hold that section 7049 of

the General Statutes of 1909 (Laws 1907, ch. 286, § 1) is not repugnant to section 8 of article 11 of the state constitution.

In his brief the attorney-general indicates that millions of dollars have been paid or assumed in this state by reason of the decisions in *Leavenworth County v. Miller*, 7 Kan. 479, *The State, ex rel., v. Nemaha County*, 7 Kan. 542, and *Morris v. Morris County*, 7 Kan. 576. If so, presumably a large per cent of the bonds voted are still outstanding and unpaid. They were issued and negotiated in reliance upon the rule of property promulgated in these decisions, and this fact, if it be a fact, is a pertinent reason for maintaining the validity of the statute, rather than the reverse.

(2) As said by the defendant, the provisions of the statute relating to the recording of bonds by the auditor of state are somewhat vague and indefinite, but we think they may be fairly held to include bonds of the class in question, especially in view of the evident wisdom of the policy, in vogue for many years, to have such record in the auditor's office of all bonds issued, and when paid, by the municipalities of the state.

(3) The auditor declined to register the bonds because the plaintiff tendered him no proof that it had expended an amount of money equal to the face value of the bonds in securing and paying for lands for a right of way, depot grounds and terminal facilities. It is urged that it is the plain meaning of the language employed in the statute that bonds are to be issued only to aid in securing and paying for land to be used for the three specified purposes, to wit, "right of way," "depot grounds," and "terminal facilities." If this should be conceded, it does not follow that, as demanded, the purposes of the aid should all have been accomplished before the aid is extended. It is time to aid a drowning man when he is struggling in the water, not after he has got out on the bank. The only investigation the auditor is required or authorized to

---

Lewis v. Railway Co.

---

make before registering or refusing to register the bonds when presented for that purpose is to ascertain whether the bonds were issued according to the provisions of section 7049 of the General Statutes of 1909 (Laws 1907, ch. 286, § 1), and whether the signatures thereto of the officers signing the same are genuine. (Laws 1874, ch. 39, § 6; Gen. Stat. 1909, § 581.) That the railroad company has secured or paid "for lands for right of way, depot grounds and terminal facilities" is not made a prerequisite to the voting, issuance or registration of bonds by the terms of the act.

The peremptory writ is allowed.

---

ROBERT R. LEWIS, *a Minor, etc., Appellee*, v. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant*.

No. 16,447.

RESIDENCE—*Minor—Emancipation*. A finding that a minor had been emancipated by his parent and that he was a resident of this state was sustained by evidence.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 9, 1910. Affirmed.

*John Madden*, and *W. W. Brown*, for the appellant.  
*A. L. Billings*, for the appellee.

*Per Curiam*: The plea in abatement raised the single question whether the plaintiff was a resident of Kansas at the time the action was commenced. From the evidence it was for the jury to determine this fact, which involved his intention and whether his mother by her actions had emancipated him. The emancipation of a minor by his parent may be inferred from the



---

King v. Modern Woodmen.

---

conduct of the parties or other circumstances. (*Halliday v. Miller*, 29 W. Va. 424; *Flynn v. Baisley*, 35 Ore. 268; *Dierker, to use of Shoemaker v. Hess, et al.*, 54 Mo. 246.) The jury, in substance, found that the mother in this instance relinquished all claim to the plaintiff's earnings and all right to control him. He testified that it was his intention to make his domicile in Kansas, so that there was evidence to sustain the jury's findings. The case of *Modern Woodmen v. Hester*, 66 Kan. 129, is not controlling, because there was no question in that case of emancipation. Here the whole case turned upon that question, and, there being evidence in our opinion to support the finding of the jury, the judgment must be affirmed.

---

SARAH A. KING *et al.*, Appellees, v. THE MODERN  
WOODMEN OF AMERICA, Appellant.

No. 16,449.

FRATERNAL INSURANCE—*Age of Applicant—Representations—Findings.* Where a fraternal insurance society refused to pay a death benefit on the ground that the deceased had misrepresented his age in his application for membership, a finding that his age was correctly stated in the application held conclusive on review.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 9, 1910. Affirmed.

*Truman Plantz, George G. Perrin, and Banks & Bertenshaw*, for the appellant.

*C. W. Shinn, and Alvin V. Sharpe*, for the appellees.

*Per Curiam:* Sarah A. King, widow, and William E. King, son of Jeremiah King, deceased, commenced this action against the Modern Woodmen of America, to

---

King v. Modern Woodmen.

---

recover the sum of \$2000 due them as beneficiaries under a certificate issued by the defendant to Jeremiah King, April 30, 1895. The certificate was made payable to the wife and son of Jeremiah King, in the sum of \$1000 each. When Jeremiah King joined the society he made application in writing, which contained the following provision:

"I do hereby consent and agree that this application and the laws of the order shall form the sole basis of my admission to and membership in this order, and of the benefit certificate to be issued to me by this order on this application, . . . and that any untrue or fraudulent statement or answer or any concealment of facts, intentional or otherwise, in this application, shall forfeit the rights of myself and my beneficiaries to all benefits and privileges therein or arising therefrom.

"Give date of birth. Ans. June 22, 1850."

On January 30, 1906, Jeremiah King died at Cherryvale, Kan., at which time he was a member in good standing of Ozark Camp No. 3585 of the Modern Woodmen of America, located at Liberal, Barton county, Missouri. Proofs of death were duly made to the order, but payment was refused for the reason that the age of the deceased was falsely stated in the application. The proof of death stated that the deceased was born June 22, 1849. If born in 1849 his age when he became a member was such as to make him ineligible to membership, as he had passed the age limit. It was therefore claimed that the camp was deceived by the statement made, and under the provisions of the application above stated the certificate was void. The plaintiffs claimed that the age given by the deceased was true, and that the date of his birth given in the proof of death was a mistake. Upon the trial the question of age was directly placed in issue, and was the only question in controversy. The evidence upon this question was submitted to a jury, and the

---

King v. Nilson.

---

verdict was in favor of the plaintiffs. The defendant brings the case here by appeal.

The evidence was conflicting, and much of it was necessarily statements of family history and hearsay. Objections were made to the introduction of some of the evidence, which were overruled. After a careful examination of the abstract, we conclude that the question of fact was properly submitted to the jury, and their findings, after approval by the court, are conclusive here. We are unable to say that any material error was committed by the court in the presentation of the case to the jury. The conclusion reached seems to be fair and just. The judgment is affirmed.

---

ALBERT E. KING, *Appellant*, v. EUSEBIUS NILSON,  
*Appellee*.

No. 16,481.

COMPROMISE TAX DEED—*Taxes Included—Authority for Assignment of the Certificate.* A claim that a compromise tax deed was void because taxes not a lien upon the land were included, and the compromise resolution had become dormant at the time the money was paid and the assignment executed, not sustained.

Appeal from Haskell district court; WILLIAM H. THOMPSON, judge. Opinion filed April 9, 1910. Affirmed.

*Thomas A. Scates*, and *Albert Watkins*, for the appellant.

*William Easton Hutchison*, and *C. E. Vance*, for the appellee.

*Per Curiam*: The tax deed in this case being valid, the judgment must be affirmed without reference to the other questions raised.

There is no similarity between this case and that of

*Lanning v. Brown*, 79 Kan. 103, which is relied upon by the plaintiff. There the deed recited on its face that the order of the board authorizing the assignment required the payment of taxes which were not at the time a lien upon the land. This deed, on the contrary, shows that the taxes of 1900 were not included in the order of compromise, although they were paid on June 27, 1901, when the certificate was actually assigned; but in the meantime they had become a lien upon the land, and their payment, together with the amount for which the certificate was assigned, properly made up the entire consideration. The only reference to the taxes of 1900 is in the granting clause, and since it was proper for the purchaser to pay those taxes when the assignment was actually made the recital of the fact is not sufficient to avoid the deed.

Another objection to the deed is that the compromise resolution had lost its force and had become dormant at the time the money was paid and the assignment executed. The deed, being more than five years old, is entitled to every presumption in its favor. There is nothing showing that the board had revoked its authority, and the presumption is that the order was made without any condition requiring it to be accepted within a certain time. The original owner could not have been prejudiced by the order remaining open from October to the following June; he had that much more time within which to compromise the tax himself if he desired.

The judgment is affirmed.

---

H. W. MCAFEE, *Appellee*, v. O. E. WALKER, *Appellant*.

No. 16,489.

**COSTS — Printing Abstracts and Briefs — Time of Filing Statement.** Under the court rules the expense of printing abstracts and briefs held not taxable as costs unless a statement thereof is filed with the clerk prior to the expiration of ten days from the time the case is decided.

Motion to retax costs. Opinion filed April 15, 1910.  
Motion allowed. (For original opinion see ante, p. 182.)

*Per Curiam:* The clerk has taxed as costs \$65.50, the amount paid the stenographer of the trial court for the transcript, and \$23.40, the expense of printing the abstract. The appellee moves to strike out these items on the ground that no statement of either was filed with the clerk within ten days after the case was decided, as required by rule 21, which reads:

"The amount paid for the transcript of the record or case-made, for the stenographer's transcript of the evidence, or for the printing of the abstract, shall be taxed as costs only when a statement thereof shall be filed with the clerk not later than ten days after a cause is decided. The opposite party may file an objection thereto not later than twenty days after such decision."

The stenographer's receipt for the \$65.50 was attached to the transcript, and this was a sufficient statement so far as that item is concerned. No statement of the amount paid for the appellant's abstract was filed until March 23, the decision having been made March 12. The prescribed limit was exceeded by only one day, but the bar had fallen and the extent of further delay is immaterial. The very purpose of the rule was to draw at some point a hard-and-fast line, "in order that a definite limit shall be fixed within which the right must be asserted if it is not to be deemed abandoned." (*Railway Co. v. Jenkins*, 79 Kan. 698, 701.) The appellant's abstract was deposited in the clerk's office January 8, and the statement could have been filed then or at any time thereafter until and including March 22. By the terms of the rule a later filing was ineffective. The charge of \$23.40 will be stricken from the cost-bill.

J. D. BOWLAND, *Appellee*, v. THE MCDONALD INDEPENDENT TELEPHONE COMPANY, *Appellant*.

No. 16,393.

**COSTS**—*Abstract of the Record—Unnecessary Matter Included.*

The cost of printing unnecessary matter in the abstract of the record taxed to the appellant.

Rehearing on objection to taxing costs. Opinion filed April 16, 1910. Costs retaxed. (For original opinion see ante, p. 84.)

*Per Curiam:* The appellee has filed objections to taxing as costs the expense of printing certain portions of the appellant's abstract. The objections are well taken. The purported abstract is in fact a copy of the record, and is in no sense an abstract. It contains complete copies of the petition, the motion to make more definite and certain, the answer, and the reply. For the purposes of the appeal in this case the substance of the pleadings could have been stated in a dozen lines. No useful purpose was served in printing the journal entry of the ruling on the motion to make more definite and certain, or the journal entry of the judgment, or the motion for a new trial. No point was made on the form of the verdict and there was no need for printing it, yet it appears twice. All the evidence is printed instead of being abstracted; for instance, in proving his title to the land the appellee introduced two patents from the United States and two warranty deeds, which are set out in full, including the acknowledgments and formal parts. Under the issues it was unnecessary to print any part of them. Of the thirty-seven pages of the purported abstract twenty-five were wholly unnecessary, and the cost of printing the same, amounting to \$18.75, will be taxed to the appellant.

ADOLPH KRUSE, *Appellee*, v. J. E. CONKLIN, *Appellant*.

No. 15,970.

SYLLABUS BY THE COURT.

1. UNRECORDED CONVEYANCE—*Rights of Subsequent Purchasers*. An unrecorded conveyance of real estate is good except as against a person who purchases without notice thereof and for a valuable consideration.
2. ——— *Payment of Valuable Consideration by Second Purchaser—Burden of Proof*. Where, after the execution of a conveyance which is not recorded, the grantor conveys the same property to another, the latter, in order to be protected by the recording act, must assume the burden of proving that he was a purchaser for a valuable consideration. Recitals in the conveyance itself of the payment of consideration are no evidence thereof as against strangers.
3. ——— *Presumption that Second Purchaser Acted in Good Faith and without Notice*. As soon as it appears that a valuable consideration has been paid the presumption arises that the purchaser acted in good faith and without notice of the rights of those who claim under the unrecorded deed. Until there is proof that he paid a valuable consideration there is no presumption of good faith.

Appeal from Kiowa district court; EDWARD H. MADISON, judge *pro tem*. Opinion filed May 7, 1910. Reversed.

STATEMENT.

THIS was an action in ejectment to recover the possession of 160 acres of land in Kiowa county. After issues were joined a jury was waived. The court made findings of fact which are, in substance:

(1) C. L. Davidson held a mortgage on the land, dated July 2, 1887, payable five years after date.

(2) Soon after the execution of the mortgage the land was abandoned by the owner of the fee.

(3) In 1890 the Fullington Live Stock Company included the land in a large pasture owned by it, in which there were several tracts of land to which it

---

Kruse v. Conklin.

---

had no title. The company leased the land from Davidson, the owner of the mortgage, and paid rent to him for several years; afterward it purchased the note and mortgage from him and retained possession of the land under the mortgage, paying rent to no one. The mortgage debt has never been paid.

(4) On March 3, 1900, the Fullington Live Stock Company was adjudged a bankrupt, and J. E. Conklin of Wichita became the trustee of the estate and took possession of the property of the bankrupt, including the pasture in which the land in question was located. Afterward the trustee leased the pasture to W. G. Fairchild for one year. In April, 1901, some difficulties arose between the trustee and Fairchild and J. E. Conklin, the defendant herein. J. E. Conklin, the trustee, and J. E. Conklin, the defendant, are different persons. The trustee began proceedings in the federal court to oust Fairchild and the defendant from the land. While these proceedings were pending Conklin, the defendant, made an offer to the court to purchase all the interest of the trustee in the lands of the bankrupt for the sum of \$3000. This offer was accepted by the court and the trustee ordered to convey all the interest of the bankrupt in the lands by a deed, which should be in substance and effect a quitclaim deed. Conklin, the trustee, was not present when the offer was made, nor was he consulted about it or advised of it at the time.

(5) In pursuance of this order W. G. Fairchild, attorney for the defendant, prepared a deed to be executed by the trustee, and included therein the land in question. The trustee afterward executed the deed as prepared by Fairchild, with the description of this land included, and delivered the same to the defendant. The trustee made very little examination of the deed to ascertain its contents.

(6) At the time the trustee qualified he took possession of the note and mortgage which had been pur-



chased by the Fullington Live Stock Company from the mortgagee, and listed the same as personal property, had the same appraised as such, and, in May, 1900, offered the mortgage and note for sale at public auction, in pursuance of the court's order to sell the personal property of the bankrupt. But no sale of the note and mortgage was made, on account of the lack of bidders. At the time of the execution of the deed by the trustee conveying the interest of the bankrupt in the lands to the defendant the note and mortgage were in the possession of the trustee, and no demand of any kind was made on him personally for the delivery of the note and mortgage to the defendant. At the time of the preparation of the deed some conversation occurred between the attorney for the trustee and W. G. Fairchild, in which it was said that the mortgage had been mislaid, could not be found at the time; and it was agreed between the attorneys that the insertion of the description of the land in the deed would convey the title of the trustee.

(7) The defendant has been in actual and exclusive possession of the land under his deed from the trustee from the 22d of April, 1901, until the present time. He has had the same inclosed in a large pasture with other lands, some of which are owned by him and some of which he has leased from the owners. The deed from the trustee was not recorded until the 3d day of December, 1901.

(8) In May, 1901, J. E. Conklin, trustee, being in the possession of the note and mortgage, assigned and delivered the same to one Cyrus Ritchie. There is no evidence as to the actual consideration for the assignment or any evidence showing whether Ritchie had actual notice of the trustee's deed to the defendant. Soon after the assignment to him of the note and mortgage Ritchie assigned and delivered the same to M. P. Hocking, and there is no evidence as to the actual consideration paid by Hocking or whether he

had actual notice of the trustee's deed. In July, 1901, Hocking brought an action to foreclose the mortgage against the Fullington Live Stock Company and the original mortgagors and the former owner of the fee. He obtained a judgment of foreclosure, and purchased the land at sheriff's sale September 20, 1902. Whatever title Hocking took by the sheriff's deed now belongs to the plaintiff, Kruse.

As conclusions of law the court found:

"(1) The Fullington Live Stock Company was a mortgagee in the possession of the land in controversy after the purchase of the note and mortgage from C. L. Davidson.

"(2) The trustee of the estate of the Fullington Live Stock Company, after he took possession of the ranch and pastures of the said company, was a mortgagee in possession of the said land.

"(3) By the execution and delivery of the trustee's deed the note and mortgage were assigned to J. E. Conklin, defendant.

"(4) The defendant, Conklin, by failing to obtain possession of the note and mortgage from the trustee and withholding his deed from record, was guilty of negligence.

"(5) Cyrus Ritchie was a purchaser of the note and mortgage for value, and without notice of the interests of the defendant, Conklin.

"(6) The plaintiff is entitled to recover the possession of the land in controversy."

In accordance with these findings judgment was rendered for the plaintiff, and the defendant appeals.

*W. G. Fairchild*, for the appellant; *H. S. Lewis*, of counsel.

*J. W. Davis*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The defendant challenges the correctness of the fourth, fifth and sixth conclusions of law. The challenge must be sustained. The fourth and fifth conclusions upon which the court predicates the judg-

---

Kruse v. Conklin.

---

ment in substance amount to this: Cyrus Ritchie having purchased the note and mortgage for value and without notice, he and the plaintiff, who claims under him, are protected by the recording act, and because of the failure of the defendant to record his deed the plaintiff's title is superior. But that part of the fifth conclusion of law which holds that Ritchie purchased the note and mortgage for value is not supported by the findings of fact. In the eighth finding of fact it is said: "There is no evidence as to the actual consideration for said assignment, and no evidence as to whether Ritchie had actual notice of the conveyance to Conklin, defendant." The court's error was holding that, in the absence of any evidence to the contrary, Ritchie must be presumed to have purchased for value and without notice. While there is some conflict in the authorities, the rule appears to be settled by the better reasoning as well as the weight of authority that the burden of proof as to the payment of a valuable consideration rests upon the subsequent purchaser. (*Coon v. Browning*, 10 Kan. 85; *Morris v. Daniels*, 35 Ohio St. 406; *Roseman et al. v. Miller*, 84 Ill. 297; *J. D. and D. Halstead v. the President, Directors and Company of the Bank of Kentucky*, 4 J. J. Mar. [Ky.] \*554; *Lake v. Hancock, use of Payne*, 38 Fla. 53; *Nickerson v. Wells-Stone Mercantile Co.*, 71 Minn. 230; 23 A. & E. Encycl. of L. 522, 523; 24 A. & E. Encycl. of L. 140.)

Although the language of our recording act has been changed since the decision in *Coon v. Browning*, supra, the present statute has exactly the same force and effect as the former. This, in effect, was held in *Holden v. Garrett*, 23 Kan. 98. The reason of the rule that the burden of proof as to the payment of a valuable consideration rests upon a subsequent purchaser is that while the recital in a deed that the consideration has been paid is *prima facie* evidence, as between the parties, it is no evidence against a stranger. (*King v. Mead*, 60 Kan. 539; *Doty v. Bitner*, post.)

Other reasons given for the rule are that the knowledge and means of proving the consideration are more reasonably and naturally in the possession of the grantee and the difficulty which ordinarily arises where an attempt is made to prove the negative rather than the affirmative of a proposition.

As to notice, it will be observed that the rule is equally well established that the burden is on the one who claims under the prior unrecorded deed. At least, this is true as soon as it is established that the subsequent purchaser parted with value. Many of the courts take the view that the burden of proof as to the good faith of the subsequent purchaser shifts as soon as the last purchaser has shown that he paid a valuable consideration. (*Morris v. Daniels*, 35 Ohio St. 406; *Iron Co. v. Iron Co., et al.*, 105 Iowa 624; 23 A. & E. Encycl. of L. 523, and cases cited in note.) As soon as it appears that a valuable consideration has been paid the presumption arises that the purchaser acted in good faith and without notice of the rights of the parties who claim under the unrecorded deed. In *Morris v. Daniels*, supra, it was said:

"The rule in such case is entirely analogous to that which obtains in relation to commercial paper, and rests on the same principle. The indorsee of negotiable paper before due must prove the payment of a valuable consideration as soon as it is shown that the instrument was made without consideration, or was obtained by fraud." (Page 417.)

In the present case the court assumed, in the absence of evidence to the contrary, that the subsequent purchaser paid value and took the title to the note and mortgage without notice of the defendant's interests. This was error. Until there was proof that the purchaser paid a valuable consideration there was no presumption of good faith. Of course, before the subsequent purchaser can take advantage of the failure of the prior purchaser to record his deed, he must be

---

Nelson v. Butler County.

---

himself a purchaser for value and without notice. (*Grocer Co. v. Alleman*, 81 Kan. 543; *Morris v. Wicks*, 81 Kan. 790; *Doty v. Bitner*, post.)

From the findings of fact it appears that the bankruptcy court ordered the note and mortgage sold as personal property at public sale in May, 1900, and that it was offered for sale at that time in pursuance of the court's order, but no sale of it was made because of lack of bidders. It does not appear by what authority the trustee proceeded to sell the same more than a year afterward at private sale, and the question of his authority to sell it when he did may have a bearing in determining the good faith of the plaintiff in the transaction. The whole case turns upon this proposition, and, since there was no evidence to support the conclusion of law that the plaintiff purchased for a valuable consideration and without notice, the judgment must be reversed and a new trial ordered.

---

GEORGE C. NELSON, *Appellant*, v. THE BOARD OF  
COUNTY COMMISSIONERS OF THE COUNTY OF BUTLER,  
*Appellee*.

No. 16,249.

SYLLABUS BY THE COURT.

**HIGHWAYS**—*Appeal from Award—Evidence of Prior Establishment of Highway.* On an appeal to the district court from an award of damages allowed by the county commissioners for the establishment of a highway the county attorney in his statement to the jury said that the land did not belong to the appellant, as a public highway had long ago been established upon that same line by the legislature. On the trial the county attorney introduced an act of the legislature by which, in 1872, roads were established on all section lines in that and other counties. At the proper time the appellant requested the court to instruct the jury to disregard

---

Nelson v. Butler County.

---

the fact that a public highway had been established on such line, which was refused. *Held*, error.

Appeal from Butler district court; GRANVILLE P. AIKMAN, judge. Opinion filed May 7, 1910. Reversed.

*T. A. Kramer*, and *George J. Benson*, for the appellant.

*Fred S. Jackson*, attorney-general, and *K. M. Geddes*, county attorney, for the appellee; *C. A. Leland*, of counsel.

The opinion of the court was delivered by

GRAVES, J.: This is an action to recover damages on account of establishing a public highway over the land of the appellant. The road was regularly established under the statute. The county commissioners allowed the appellant \$134, and he appealed from this allowance to the district court, where the verdict was in favor of the county, and now he appeals to this court.

Only two questions are presented—irregularity of the court by which the appellant was prevented from having a fair trial, and misconduct of the county attorney which prevented the appellant from having a fair trial. Upon the statement of the case the county attorney made the following statements to the jury:

“There won’t be any evidence here to show that Mr. Nelson ever owned the land over which this public highway is located; but there will be evidence that this public highway was located in 1872.

“The evidence will be that this public highway was located in 1872, long before Mr. Nelson or anyone else, except the government, had it. The evidence will be that the government and the legislatures of the state of Kansas located that public highway before ever any patent was issued to it.”

To this the appellant objected and excepted, and

---

Nelson v. Butler County.

---

asked to have it withdrawn from the consideration of the jury, which was refused by the court.

Upon the introduction of the evidence the county attorney introduced chapter 181 of the Laws of 1872, which declared all section lines in several counties, among which was Butler, to be public highways. This was also objected to. At the proper time the appellant requested the court to give the following instruction to the jury, which was refused:

"The fact, if it be a fact, that prior to the time the road in question was located by the board of county commissioners a road may have been provided for along the same line by the act of congress, or some other method, can not be taken into consideration by you in estimating the damage in this case. In other words, plaintiff is entitled to just as much damages as he would be if such road had not been previously located or provided for."

Otherwise the case was tried in the manner usual in such cases. On the question of damages it was undisputed that two and one-half acres of land were taken for the road and were worth at least \$12 per acre. It was not pretended that the landowner received compensation for this by benefits or otherwise. There was nothing in the evidence sufficient to justify a verdict for the appellant for less than \$30, and a much larger verdict was justifiable.

It was clearly erroneous for the court to permit the county attorney to call the attention of the jury to this act of the legislature. No purpose is apparent for doing so other than to influence and mislead the jury. The error in making the statement was emphasized by the refusal to exclude it from the jury upon request. The instruction to the jury requested by the plaintiff was proper, and ought to have been given. (*Comm'rs of Lyon Co. v. Kiser*, 26 Kan. 279; *Comm'rs of Wa-baunsee Co. v. Bisby*, 37 Kan. 253; *Briggs v. Comm'rs of Labette Co.*, 39 Kan. 90; *Cowley County v. Hooker*,

70 Kan. 372.) In the case of *Comm'rs of Wabaunsee Co. v. Bisby*, supra, it was said in the opinion:

"The county was treating this matter as if no road had ever been located there. Whatever proceedings had taken place prior to that time the county commissioners were entirely ignoring; they were saying to the defendant, We are about to locate and establish a road over your land, and if you claim damages you must present your claim. And after the county board has done this it can not be heard to say, A public road is already established over this same route, and therefore the plaintiff is not damaged." (Page 255.)

The only thing that can be said to avoid a reversal here is that no prejudice resulted from the error committed. This conclusion, however, is not apparent. The verdict is erroneous. It can not be justified under the evidence, and therefore something must have misled the jury. No other reason appearing for the conduct of the jury, we conclude that it was the result of this error, and therefore the judgment is reversed.

---

LEE A. HOWERTON *et ux.*, Appellees, v. THE KANSAS  
NATURAL GAS COMPANY, Appellant.

No. 16,292.

SYLLABUS BY THE COURT.

1. MINERAL LEASE—*Cancellation for Insufficient Development—Adequacy of Remedy in Damages—Burden of Proof.* An oil-and-gas lease provided that the lessee should pay \$50 per year for each gas well upon the leased premises during the time gas should be marketed therefrom. Adhering to the decision on a former hearing (*Howerton v. Gas Co.*, 81 Kan. 553) that the contract contemplated that other wells should be drilled with reasonable diligence to utilize this lease, it is further held, that the burden of proof is upon the plaintiff to show that a remedy in damages is not an adequate remedy for the failure of the lessee to proceed to drill other wells to protect the land from drainage and to obtain gas therefrom.

82	367
182	861



---

Howerton v. Gas Co.

---

2. ——— *Same*. Having failed to make this showing, the decree for cancellation can not be sustained.
3. ——— *Measure of Damages for Failure to Drill Wells*. The measure of damages is the sum of \$50 per year for each well from the time it ought to have been drilled.
4. ——— *Alternative Decree for Breach of Agreement by Lessee to Operate*. If it be determined that such a rule of damages can not be applied, an alternative decree may be entered, upon proper proof, providing that the defendant shall proceed, within a time to be fixed, as before indicated, to drill such wells as may be necessary to protect and develop the land and utilize the gas thereon, and pay for such wells as stipulated, or that the lease be canceled.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion on rehearing, filed May 7, 1910. (For first opinion see *Howerton v. Gas Co.*, 81 Kan. 553.) Reversed.

*Eugene Mackey*, and *John J. Jones*, for the appellant; *Jones & Reid*, and *Mackey & Sculley*, of counsel.

*Baxter D. McClain*, for the appellees.

*H. P. Farrelly*, and *T. R. Evans*, as *amici curiæ*.

The opinion of the court was delivered by

BENSON, J.: This action has been reconsidered by the court after argument upon a rehearing heretofore allowed. The facts are stated in the first opinion. (*Howerton v. Gas Co.*, 81 Kan. 553.)

Upon a careful consideration of the arguments made upon the rehearing and of the authorities the court is satisfied with the former opinion, except in one particular. It was held that there was no adequate remedy in damages for the default of the defendant. Upon a review of the findings of the district court, and of the evidence upon which the conclusions of law of that court were based, we now hold that the plaintiffs failed to show, as they were required to do in order to obtain equitable relief, that damages would not afford an ade-

quate remedy. The default consisted in the failure properly to develop the leased territory by drilling and operating a reasonable number of wells necessary for that purpose, and the failure to market gas from, and make the payments stipulated for, the well completed. No reason is shown why witnesses of experience, acquainted with the gas field, may not testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land, both for protection from drainage by neighboring leaseholds and to obtain the gas underneath the land. No insurmountable obstacle to such proof is perceived by the court, and in the absence of evidence that it can not be produced it is concluded that the plaintiffs are not entitled to a remedy by forfeiture or cancellation of the lease. This conclusion is supported by *Harris v. The Ohio Oil Co.*, 57 Ohio St. 118, cited in the first opinion, and other adjudicated cases which have followed that decision. It needs no authority, however, to support the proposition that if there is an adequate remedy in damages no other relief can be obtained. The burden was upon the plaintiffs to show, either by the nature of the case or by proper evidence, that such damages could not be ascertained with reasonable certainty. Failing in this, the judgment of cancellation can not be sustained.

It should be observed that this is not a case where royalties payable in a share of the product are provided for, but is an agreement to pay \$50 per annum for each gas well. The measure of damages, therefore, is the sum the plaintiffs have lost or may lose by the failure of the defendant to complete the number of producing wells reasonably necessary to develop the resources of the leased land and to protect its lines. When the plaintiffs shall have received \$50 per year for each well from the time it should have been drilled they will have received the full compensation agreed

upon in the lease. Under the terms of the lease they have no share in the product of the wells, no concern as to the disposition which shall be made of that product, and the rules to be applied in leases where the lessor is given a royalty are not entirely applicable here. Penalties and forfeitures are not favorites of the law, and if in this case the damages which the plaintiffs sustain from the breach of the contract can be ascertained with reasonable certainty no forfeiture can be adjudged. It should also be observed that the plaintiffs, during all this long delay for which they now seek a forfeiture, made no complaint other than that the test well was leaking. Some affirmative action ought at least to have been taken by them indicating a purpose to insist upon a forfeiture before summarily declaring it.

If it shall be ascertained upon another trial that such a rule can not be applied, an alternative decree may be entered, upon proper proof adduced to support it, providing that the defendant shall proceed within a reasonable time, fixed by the court, to drill wells and develop and protect the land leased, as before indicated, and pay the amounts stipulated in the lease for such wells, as well as for the well already completed, or, failing to do so, that the lease be canceled. To this end proper amendments of the pleadings should be allowed if requested or found to be necessary.

The judgment is reversed and the cause remanded for further proceedings in accordance with these views.

PORTER, J. (concurring specially): I think the court should declare as a matter of law, from its knowledge of conditions in the oil-and-gas territory, that witnesses of experience can testify with reasonable accuracy to what number of wells would be required properly to develop the land embraced in the lease, including such wells as would reasonably be necessary to protect

the land from drainage from other wells; and that, since judicial knowledge takes the place of proof, we should hold that the action to forfeit or cancel the lease can not be maintained because it appears that the plaintiffs have an adequate remedy in an action for damages.

BENSON, J. (dissenting): A reëxamination of this case has confirmed the views expressed in the first opinion. I am unable to see how the rule of damages announced by the court can be applied to afford adequate relief. How many wells should be drilled, and when they should be drilled, will, I believe, result in mere conjecture, even after the most patient judicial inquiry. The plaintiffs had a right to expect an actual demonstration by a reasonably diligent use of the drill. The opinions of witnesses, however confidently given, must necessarily be speculations. The evidence shows that wells were drilled around this tract during the year before the trial, some of which were dry. Who can say how many wells to be drilled on this tract will produce gas in marketable quantities? The result of drilling each successive well may change the prospect and consequently vary the obligation of the lessee. If a new well or wells should diminish the pressure in the others, the prospect would be affected unfavorably; if that result should not follow, the prospect might be improved. If the operations should result in several dry wells, the situation would be again changed. In each contingency an estimate of the number reasonably necessary would be varied. If it be suggested that in case the probable result can not be foretold the plaintiffs have no equity to be preserved, the answer is that in just such cases equity furnishes the only adequate relief. The plaintiffs had sufficient faith in the resources of the land to contract for its development and encumber it with a lease. The defendant had sufficient faith to agree to make such

exploration and operate the wells for the benefit of both parties. That there is gas to be utilized is shown by the test well; but the defendant now refuses to go further, and when summoned to answer for its default stood entirely upon its supposed legal rights, claiming that it was justified under the contract in refusing to operate or pay for the one well or to drill others. The lease provides for its own indefinite extension if gas is found in paying quantities. Such gas has been found. Can the lessee delay work and defer payment indefinitely? It has pursued and is pursuing active operations in drilling gas wells on adjacent leases, with varying success, and other parties are also drilling wells in the same vicinity and marketing gas therefrom. The effect these operations may have upon this lease seems not to affect the views or conduct of the defendant, although the migratory character of oil and gas is well known and has been often referred to in judicial decisions and made the basis of requirements for prompt action.

The right of the plaintiffs to reasonable returns from their property under this lease is disregarded, and no promise is given to proceed. In this situation the remarks of the Pennsylvania supreme court in *Munroe v. Armstrong*, 96 Pa. St. 307, is pertinent, viz., that the lessee is "bound to operate or quit." (Page 310.) While the terms of the lease referred to in that case were different from the one now under consideration, in view of the obligation of the parties here, as interpreted by the court, the foregoing language seems applicable. The alternative decree provided for will, I fear, be found difficult to frame or to enforce, and may only serve to perpetuate litigation. It is hoped, however, that it will be the means of administering justice. in case that end is not reached by an award of damages—which seems to the writer improbable.

Mr. Justice GRAVES concurs in this dissent.

THE STATE OF KANSAS, *Plaintiff*, v. M. C. KENNEDY,  
*Defendant.*

No. 16,305.

## SYLLABUS BY THE COURT.

1. COUNTY COMMISSIONERS—*Repair of County Bridges.* Under the provisions of article 2 of chapter 14 of the General Statutes of 1909 the board of county commissioners must determine what bridges shall be repaired at the expense of the county, the plans to be followed, the material to be used and the cost of the work, and must make appropriations to pay for the work. It may appoint a superintendent of repair for each bridge, but is not obliged to do so, and may itself exercise general oversight and supervision of the execution of contracts for such work.
2. ——— *Performance of Official Services by a Single Member Outside of Board Meetings.* The efficient discharge of its duties may, and frequently does, require the board of county commissioners to perform official services outside of board meetings. In some instances the joint observation and combined participation of all the members may not be necessary, and in such a case a single member, acting as a committee of the board, may render lawful services as a commissioner. Bridge repair work and oversight of the poor farm may afford opportunity for such services.
3. ——— *Compensation of Members of Board.* The statutes of this state do not limit the compensation of members of the board of county commissioners to pay for services rendered at board meetings, and single members performing services of the kind described in paragraph 2 may be paid therefor the per diem compensation provided by statute, and statutory mileage.
4. ——— *"Corruption"—Removal from Office—Payment of Illegal or Excessive Demands against County.* "Corruption," within the meaning of section 2309 of the General Statutes of 1909 (Gen. Stat. 1868, ch. 25, § 180), providing that if any county commissioner shall corruptly perform any duty he shall forfeit his office and be removed, involves the intentional disregard of law from improper motives; and in order that the payment of excessive or illegal demands against the county may be corrupt the commissioner must have purposed to violate his official duty, defraud the county by misappropriating its funds and secure to himself or to some one else unlawful gain.

---

The State v. Kennedy.

---

5. ——— *Burden of Proving Corruption—Presumption of Honesty and Good Faith.* In an action to remove a county commissioner on the ground that he corruptly performed his duties the burden of showing corruption rests upon the state. The law presumes honesty and good faith until the contrary is made to appear by evidence, and the commissioner is not called upon to justify himself until something evidencing corruption is offered.
6. ——— *Same.* In such an action record proof of the number of board meetings attended by the commissioner in a given month merely shows what his compensation for attending board meetings in that month should be. It does not tend to prove that other services were not performed, or cast the burden upon the commissioner of justifying the receipt of more compensation for that month than he was entitled to for attending board meetings.
7. ——— *Payment of Unverified Claims—Inadvertence—Corruption.* Occasional departures by the board of county commissioners from the statute relating to the allowance of claims against the county, as that claims were not verified, occurring through mere inadvertence, without wrongful intent and under circumstances exposing the county to no imposition or injury, do not constitute corruption.
8. ——— *Payment of Claims Not Sufficiently Itemized—Advice of County Attorney.* The payment of claims which are not sufficiently itemized, occurring through a misinterpretation of the statute relating to that subject, does not constitute corruption, where the board acts in good faith and relies upon the advice of the county attorney that the claims are sufficiently itemized.
9. ——— *Neglect or Refusal to Perform Official Duty—Removal from Office.* Under section 2309 of the General Statutes of 1909 (Gen. Stat. 1868, ch. 25, § 180), providing that if any commissioner or other county officer shall neglect or refuse to perform any act which it is his duty to perform he shall forfeit his office and be removed, the duty must be personal and the act must be one which the officer has the legal capacity and authority to perform or he can not be guilty of neglect.
10. ——— *Forfeiture of Office—Grounds.* It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The purpose of the statute is to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or its gravity, endangers the public welfare; and the neglect contemplated must disclose either willfulness or indifference to

---

The State v. Kennedy.

---

duty so persistent or in affairs of such importance that the safety of the public interests is threatened.

11. ——— *Same*. Under the circumstances of this case it is held that irregularities in the publication of statements of sums of money allowed and in advertisements for bids for bridge repair work, failure to publish estimates of expenditures upon which tax levies were made, and failure to advertise for bids for the repair of a bridge, do not constitute legal causes for the removal of a county commissioner from office on the ground of neglect of duty.

Original proceeding in quo warranto. Opinion filed May 7, 1910. Judgment for the defendant.

*Fred S. Jackson*, attorney-general, *Lee Bond*, county attorney, and *Keplinger & Trickett*, for the plaintiff.

*William Dill*, and *A. E. Dempsey*, for the defendant.

The opinion of the court was delivered by

BURCH, J.: This proceeding was instituted to remove the defendant from the office of county commissioner of Leavenworth county, on the ground that he corruptly performed his duties. The petition was amended to include a charge of neglect and refusal to perform acts which it was his official duty to perform. A commissioner was appointed who, after hearing the evidence and the arguments of counsel, has returned findings of fact and conclusions of law exonerating the defendant. The plaintiff attacks the commissioner's report on numerous grounds.

The findings of fact cover every issue raised by the pleadings, and it was unnecessary to extend them further. Some of those which are most important are based upon the testimony of witnesses whom the commissioner chose to believe in preference to others. From an examination of the abstracts it appears that a choice was unavoidable, that it was not arbitrarily made, and that in some instances it necessarily rested in part upon considerations which a printed record can not present. A number of matters were covered by testimony bringing them within the proved custom and



---

The State v. Kennedy.

---

practice regularly governing the transaction of county business. The commissioner appears to have relied upon this testimony in opposition to some evidence to the contrary, the weight and credibility of which he was obliged to determine. Some of the testimony for the state was of such a character that, in the light of all the evidence, the commissioner did not credit it. This observation applies to some matters which the defendant did not notice in his testimony. The commissioner's method in dealing with the evidence has been tested in other respects, and was plainly such as any trial judge would have been obliged to pursue. One of the chief controversies related to the value of bridge work. By consent of the parties, and accompanied by representatives of the parties, the commissioner visited and inspected all of the larger bridges in question and thirty of the smaller ones. Statements and explanations were made by representatives of the parties at the time of these inspections, and the bridges were examined in the light of such statements and explanations and in connection with the evidence already taken. The course adopted was wise, was consented to, no objections were interposed at the time to anything that occurred, and criticism upon the commissioner's conduct in this respect comes now with poor grace and no force. The court has taken pains to search the record for proof of the burden of the petition—willful corruption, dishonesty, conspiracy to rob and defraud the county, and like charges. There is none. Without discussing the evidence, which is voluminous and conflicting, it is sufficient to say that it sustains the findings of fact. The only questions to be considered are whether the commissioner misapprehended the law at any material point and whether his conclusions of law are correct.

The action is prosecuted under section 180 of chapter 25 of the General Statutes of 1868 (Gen. Stat. 1909, § 2309), which reads as follows:

“If any board of county commissioners, or any commissioner, or any other county officer, shall neglect or

---

The State v. Kennedy.

---

refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office, and shall be removed therefrom by civil action in the manner provided in the code of civil procedure."

The defendant is charged with corruption in the matter of his salary and mileage for the years 1907 and 1908. The statute reads as follows:

"Each member of the board of county commissioners of the several counties of the state shall receive as full compensation for his services for the county the sum of three dollars per day, and shall each be allowed and receive five cents per mile for each mile actually and necessarily traveled in the transaction of any of the duties of said office, to be paid out of the county treasury in quarterly installments; provided, that the salary of each commissioner shall not exceed in any one year the following amounts: . . . In counties having a population of . . . more than 35,000 and not more than 45,000, per annum, \$700. . . . Provided, that the salary herein provided shall be in full for all services of every kind performed by such commissioners." (Laws 1899, ch. 141, § 1; Gen. Stat. 1909, § 3676.)

The population of Leavenworth county was about 40,000. Consequently the board was governed in the matter of building and repairing bridges by article 2 of chapter 14 of the General Statutes of 1909. Under this statute it is the duty of the board to determine what bridges shall be built and what repaired at the expense of the county, and to make appropriations therefor. When the board deems it necessary to build a bridge it must determine upon the plan and the material to be used and estimate the cost. The board may appoint the township trustee or the road overseer of the district or some other person to superintend the work of construction. This provision of the statute, however, is permissive. The board is not compelled to appoint a superintendent of construction, and is at liberty to adopt any other method of supervision which shall be to the interest of the county, under the circumstances. When a bridge is completed according to contract the statute

---

The State v. Kennedy.

---

provides that it must be accepted and paid for. Substantially the same procedure governs and the same functions must be performed in repairing as in constructing bridges. If a superintendent of construction or repair be appointed, he is paid \$1.50 per day for the time necessarily consumed.

There are about 700 bridges and culverts in Leavenworth county maintained by the county. Owing to ordinary depreciation and successive floods in 1903 and the following years a very large amount of repair work was necessary during the time covered by the petition. The board adopted a rule making each commissioner from outside the city of Leavenworth chairman of the committee on roads and bridges for his district. As such he gave special attention to the duties of the board relating to bridge matters in his district. In case of a demand for repairs he would ascertain the need, and if necessary would visit the bridge for that purpose. If repairs were required he would notify the county surveyor, who by general order would make an estimate of the cost of the work. The action taken would be reported to the board. If the cost were less than \$100, informal direction for the work to be done would be given and a contract would be let. Usually contracts for repairs were performed under supervision of the county surveyor, but the committee chairman frequently visited bridges in his district undergoing repairs for the purpose of scrutinizing the work or finally approving it. When the bills came in they were approved by the county surveyor and audited by the county auditing board, consisting of the board of county commissioners, the county clerk and the county attorney. In making its recommendations this board relied largely upon the information possessed by the committee chairman in whose district the work was done, and upon the county surveyor. After bills were audited they were presented to the board of county commissioners proper for allowance and payment. The defendant received the statutory compensation for serv-

---

The State v. Kennedy.

---

ices outside of board meetings of the character described, and mileage.

The advantages of the method outlined for dispatching county bridge repair work are obvious. It was simple, reliable and businesslike. No attempt was made at the hearing to show that it increased the cost to the county. True, it might be abused by a dishonest board into a scheme to furnish illegitimate employment to its members, but there is no proof of such misconduct in this case. The services rendered by the defendant were not performed by him as a private individual for the board, or as an employee of the board. The board itself acted for the county, by and through him. He acted solely in the capacity of a county commissioner representing the county in the conduct and management of its business affairs. He was not usurping any of the functions of road overseer or township trustee, or performing any of the duties of a hired superintendent of repair. The efficient discharge of its duties requires the board of county commissioners to perform numerous official services outside of board sessions. The statute quoted does not restrict compensation to salary for services rendered at board meetings only, and there is no statute of that character in this state, as there is in some states. Therefore the defendant was entitled to \$3 per day for whatever time he necessarily consumed, and five cents per mile for each mile actually and necessarily traveled, in looking after county bridge repairs. There is no doubt that the board of county commissioners is an entirety, and must act as such. Its authority can not be delegated to a single member, and an individual member can not bind the county. But these principles are beside the question. As a practical matter a certain division of labor is indispensable to the transaction of the public business at board meetings, and if done in absolute good faith the same division may be extended to certain classes of work which must be performed outside of

board meetings. In this case the defendant had general oversight of the poor farm. Another member had general supervision of the courthouse, the courthouse grounds and the jail. On a given day these two members may be separately occupied with these duties while the third visits a reported bridge to ascertain what, if any, repairs are needed. Action by the board is required in each instance, but the joint observation and combined participation of all the members would be superfluous. If in such a case the board be guided by the sole motive of rendering faithful and efficient public service within the scope of its lawful powers, each member is entitled to compensation according to the statute.

During the time covered by the petition the board expended for bridge work and material nearly \$36,000. The commissioner found that the board paid a total of \$196.80 more than the work was worth for the repair of seven small bridges, the excess for each bridge being from \$10 to \$49. The defendant voted to pay these bills. The state does not point out how many, if any, of the several bridges were in the defendant's district. It may be assumed that some of them were. The defendant also joined with his associates in paying a bill for the printing of primary election ballots which had been approved by the county clerk and by the auditing board. Afterward a question arose concerning the proper method of computing the printer's compensation. The county attorney was consulted, and the opinion of the attorney-general was taken. The board then demanded that the printer refund a portion of the amount he had received, to conform to the attorney-general's interpretation of the law, which the printer did. The original bill was \$1246, and the amount refunded was \$770. The commissioners were not familiar with the decision of this court in the case of *Honey v. Jewell County*, 65 Kan. 428, and made the same mistake the commissioners of Jewell county made, which occasioned that suit.

---

The State v. Kennedy.

---

There is no evidence whatever that the appropriations enumerated were corruptly made. Corruption, in the sense of the statute quoted, involves the intentional disregard of law from improper motives. The defendant must have purposed to violate his official duty, defraud the county by misappropriating its funds, and secure to himself or to some one else unlawful gain. The principle is well illustrated in two decisions from Idaho, rendered under a statute providing for the removal of an officer for charging and collecting illegal fees. In that state county commissioners are entitled to compensation for services rendered at board meetings only. Members of certain boards parceled out among themselves road and bridge work which none but road overseers could legally perform, for which they charged and collected compensation and mileage. In the case of *Miller v. Smith*, 7 Idaho, 204, collusion, fraud and corruption were proved, and the guilty commissioner was removed and fined. In the subsequent case of *Ponting v. Isaman*, 7 Idaho, 581, it was found that the commissioner there prosecuted had acted honestly and in good faith. The syllabus by the court reads:

"When proceedings under section 7459 of the Revised Statutes are brought to remove a county officer, and the court finds that such officer acted honestly in making such charges against his county, and honestly believed at the time he presented his claim for allowance, and when he collected the same, that such charges were legal, it is error to remove him from office and enter judgment against him for the penalty provided by said section."

Even if, therefore, the charges made by the defendant for services and for mileage in connection with bridge repairs had been illegal, his innocence, good faith and integrity would protect him from removal on the ground of corruption. The same rule applies to other appropriations of money.

The defendant presented itemized and verified

---

The State v. Kennedy.

---

claims for salary and mileage, showing the days on which he rendered services and the number of miles traveled each month. The state introduced the records showing the number of board meetings the defendant attended in each month, and proved the distance he lives from the courthouse. Computing salary and mileage from these data, the amounts were less than the defendant received. It is argued that he should have explained the remainder. The state brought the action, and the burden rested upon it to prove corruption on the part of the defendant sufficient to warrant his removal from office. The law presumes he regulated his conduct according to his oath until the contrary is made to appear by proof. (*The State v. Trinkle*, 70 Kan. 396.) He was not called upon to justify himself until something evidencing corruption was offered. If he did not consume the time or travel the miles for which he charged, the state should have shown the facts. The proof offered had no tendency of that kind. Aside from mere presumption, however, the defendant's official probity was fully established.

In a number of instances bridge bills were paid which had not been verified according to law. The vouchers were approved by the county surveyor and by the auditing board, and blank forms for verification which the board provided were attached but not filled out. The omission of proper verifications upon the bills was simply overlooked. Such occasional departures from the statute relating to the allowance of claims, occurring as they did through mere inadvertence and without wrongful intent, and under circumstances exposing the county to no imposition or injury, do not, of course, constitute corruption as it has been defined. The same subject is brought forward in the petition under an allegation of neglect and failure to require the verification of accounts. The commissioners have no mandatory power to compel parties

---

The State v. Kennedy.

---

to verify claims. They merely have authority to reject unverified claims. The subject of neglect of official duty will be considered later in this opinion.

Numerous bridge bills approved by the county surveyor and by the auditing board were paid which it is charged were not itemized according to law. The work was done under contracts based on estimates made by the county surveyor, was done under the supervision of the surveyor and members of the board, was inspected by the county surveyor when completed, and the county surveyor approved the vouchers before they were presented. The vouchers indicated the bridge on which the work was done, and the amounts of the bills. The members of the board considered with the county attorney the question whether such bills were sufficiently itemized, and accepted his advice that they were. If any mistake were made, which is not decided, it consisted in the misinterpretation of a statute as applied to a particular state of facts. There is no doubt of the ability and the sincerity of the county attorney or of the good faith of the board. In such cases advice by the county attorney and honesty of purpose on the part of the board protect members of the board from forfeiture of office on the ground of corruption.

"Where a board of county commissioners, upon the advice of able and competent attorneys at law, allows certain claims which are not strictly legal charges against the county, its official action in so doing will not render the commissioners liable to the charge of corruption, or forfeiture of office, if the allowances were honestly made and the board acted merely upon a mistake or error of law as to the liability of the county." (*The State, ex rel., v. Scates*, 43 Kan. 330, syllabus.)

"When it is shown that such officer [a county commissioner] acted in perfect good faith, and under an honest conviction that he was entitled to the compensation claimed and collected, and was acting under the legal advice of the county attorney, it is error to re-



move him from office." (*Ponting v. Isaman*, 7 Idaho, 581, syllabus.)

Charges of corruption in drawing salary monthly and in making corrections of the tax rolls are covered by the principles already stated and applied.

The petition alleges, in effect, that the defendant conspired with others to rob and defraud the county, and that, to accomplish the corrupt designs of the conspirators, he neglected and refused to publish monthly statements of expenditures and to publish estimates of expenditures upon which tax levies were based. After much evidence had been taken the petition was amended to include the charge of simple neglect and refusal to perform official duty in these and in some other matters. The statute reads as follows:

"The board of county commissioners shall cause to be published a statement, at the close of every regular or special meeting, of all sums of money allowed, and for what purpose; said statement to be published once in some paper of general circulation in the county. They shall also publish a statement of the estimate of expenditures for the various purposes upon which they based their levy of a tax for the various purposes of revenue." (Gen. Stat. 1868, ch. 25, § 35; Gen. Stat. 1909, § 2099.)

Another statute prohibits the allowance of any claims or accounts at a special or adjourned meeting, except election expenses and jury fees.

Formerly the law provided that the Leavenworth county board should meet quarterly. At the close of each session a proper statement was duly published. Later the law was changed and monthly sessions were required. The full consequence of this change was not noted, and the board continued to publish statements quarterly as before, but not monthly. This practice was in vogue when the defendant came into office, and continued through the years of 1907 and 1908. It will be observed that statements for all monthly allowances

---

The State v. Kennedy.

---

were in fact published, and that a statement of allowances made at the last meeting in each quarter was published at the proper time. Therefore all that is left of this charge is that, because of failure to take note of an amendment of the statutes, publication of the allowances at two meetings in each quarter was delayed.

The failure to publish estimates of expenditures upon which tax levies were based is of more consequence. Such estimates were always spread in full upon the records of the meetings at which they were made, and were afterward printed on the backs of tax receipts, and so were made public in a way, but the statute prescribes publication in a newspaper. At the time of the hearing the county clerk had held his office for some thirty years. The defendant believed it was the clerk's duty to compile financial statements and publish them, and that the clerk knew his duties under orders in force prior to the time the defendant became commissioner. The defendant was under the impression that the estimates for 1908 had been published, and never knowingly omitted to perform any duty required of him.

The neglect feature of the removal statute upon which the prosecution is based is involved only so far as it deals with individual responsibility. The penalty denounced can not be inflicted on an individual officer because of neglect of duty unless he has neglected to perform some "act which it is his duty to perform." (Gen. Stat. 1868, ch. 25, § 180; Gen. Stat. 1909, § 2309.) Manifestly the duty must be personal and the act must be one which he is able to perform or he can not be at fault. He can not be guilty of neglect in failing to perform an act which he has no legal capacity or authority to perform. The duty to publish estimates of expenditures, like the duty to publish monthly statements, rested upon the board as a board.

It was impossible for the defendant alone to make a valid order for publication or to authorize a valid publication in the official or in any other newspaper. Those acts were beyond his lawful power, and his neglect must consist, if at all, in participating in an omission of the board. It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The statute must be interpreted in the light of the mischief it was intended to remedy. (*The State v. Bush*, 47 Kan. 201.) The purpose was to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or its gravity, endangers the public welfare. Therefore the neglect contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interests is threatened. Under all the circumstances stated it is held that a case of neglect within the purview of the statute has not been established.

The condition of the bridges in Leavenworth county has been referred to. Because of the interruption of travel and interference with mail routes the people were clamoring for bridge repairs and road work. Under the bridge law, if repairs cost more than \$100 the procedure for building bridges must be followed, and this requires an advertisement for bids for twenty days. Under the stress of the circumstances stated the board often shortened the time of advertisement, and in a few instances did so because of other emergencies. It acted deliberately and with full knowledge of the law. The motive was to protect the property and promote the best interests of the people of the county. In one instance a bridge lay in the creek and was in immediate danger of being lost and destroyed. On the other hand, in one instance the board was misled and consequently was mistaken as to the necessity for prompt action. There was credible evidence that all short-time advertisements produced competitive bids.

---

The State v. Kennedy.

---

The commissioner finds that all contracts under such advertisements were for the fair and reasonable value of the work. There was no advertisement at all and there were no competitive bids for the rebuilding of one bridge. The bridge was an important one on the line between Leavenworth and Wyandotte counties, and was in a dangerous condition. Under the law the duty to advertise for bids rested with Wyandotte county. It declined to proceed in the regular way, but agreed to pay its share of the joint expense if Leavenworth county repaired the bridge. The defendant protested against making a contract without advertisement, but finally deferred to the judgment of his associates because the welfare of the county required that the bridge be rebuilt at once. One of the members maintained that they always had the right to proceed without advertisement when life and property were at stake. It is undisputed that the work was well done and the amount paid was reasonable and just. There was no corruption in any of these cases.

The law relating to advertisement for bids is general in its terms. It makes no provision for exceptions and emergencies. This may be from oversight, but more likely it is because in the judgment of the legislature it would be dangerous to the public to allow all county boards to act upon whatever they might deem to be emergencies. The court does not propose to abate the force of the statute, but it requires a very savage insistence on the letter of the law to demand the defendant's removal from office for what he did. It is expected that boards of county commissioners will be diligent in taking affirmative action to protect and to promote the general welfare. Checks upon their conduct are collateral means to the same ultimate end, but in a particular instance they may operate as embarrassments. Here advertisements were made in all cases except that of the county-line bridge, where the defendant protested and the duty devolved upon

---

The State v. Chance.

---

another board. The purpose of the statute—competitive bids and fair contracts—was in fact attained through the advertisements made. While the course pursued departed slightly from that prescribed, it is free from culpability of the character the statute denounces. Besides this, the law of quo warranto authorizes the court to take a broad view of motives and circumstances in the case of an official who has assumed the responsibility of rendering the public a genuine service in a somewhat irregular way, and, although not sanctioning the defendant's conduct as legal, the court is not obliged to deprive him of his office on account of it. (*The State v. Bowden*, 80 Kan. 49.)

The foregoing contains a review of the principal charges made against the defendant. Others are embraced within the same considerations. The findings of fact and conclusions of law returned by the commissioner are approved. Restraining orders heretofore made in the case are set aside, and judgment is rendered in favor of the defendant, with costs.

---

THE STATE OF KANSAS, *Appellee*, v. ALVIN C. CHANCE,  
*Appellant*.

No. 16,308.

SYLLABUS BY THE COURT.

1. FORGERY—*Signing a Different Name than that Intended.* Where one affixes to a note a signature which he intends shall be regarded as that of another person the act is not prevented from being forgery by the circumstance that the name is not correctly written.
2. ——— *Rule Applied to "Heinis" and "Hein."* Where the name Henry "Heinis" is signed to a note with the intention that it shall be supposed to be the signature of Henry "Hein," it can not be said as a matter of law that the difference is so

---

The State v. Chance.

---

great as to prevent the deception of any person of ordinary prudence.

3. CRIMINAL LAW—*Evidence of Another Offense than the One Charged.* Upon the trial of an employee on the charge of uttering a note payable to his employer, which he had forged for the purpose of covering up a shortage, evidence that he had forged other notes for the same purpose is competent.
4. INFORMATION—*Amendment after Plea of Not Guilty.* By leave of court an information may be amended in matter of substance as well as of form after a plea of not guilty has been entered and before the trial is begun.

Appeal from Thomas district court; CHARLES W. SMITH, judge. Opinion filed May 7, 1910. Affirmed.

*W. G. Bissell*, and *Edwin D. McKeever*, for the appellant.

*Fred S. Jackson*, attorney-general, and *E. H. Benson*, county attorney, for the appellee; *Park B. Pulsifer*, of counsel.

The opinion of the court was delivered by

MASON, J.: Alvin C. Chance was convicted of forgery and of uttering a forged instrument. He appeals. He claims that the information is defective in failing to allege that the forgery was committed with the intent to defraud anyone. It alleges in detail that he forged a note purporting to be that of Henry Hein, writing the signature, however, "Henry Heinis." It then adds:

"That the name Henry Heinis as signed to said note and the name Henry Hein used herein represent . . . the same person, and in signing the name Henry Heinis to the said instrument the said Alvin C. Chance thereby intended to sign the name of Henry Hein thereto, with intent then and there unlawfully . . . to injure and defraud the said Chicago Lumber and Coal Company."

The contention is that although the information says that Chance signed another man's name to the note with intent to defraud a third person, it fails to say that he forged the instrument with that intent. If

---

The State v. Chance.

---

there is any substantial difference, the last clause quoted may be tied to all those preceding it, and be deemed to characterize every act of the defendant to which any of them refers.

A second contention is that the signature to the note (which the defendant reads Heny Heinis, but which may perhaps be read Henry Heinis) is not enough like Henry Hein to be regarded as a forgery of that name. In *The State v. Warren*, 109 Mo. 430, it was said:

"Where the accused attempts to sign the name of a person really existing, but does it so imperfectly or inaccurately that one of ordinary prudence would not be deceived by it, he can not be convicted of forgery." (Page 433.)

This rule seems to assume that persons of less than ordinary acumen are fair game for sharpers and may be defrauded with impunity; it is adapted to make the trial on a charge of swindling an inquiry into the intelligence of the person cheated, instead of into the criminality of the defendant. It has been announced in other cases (22 Am. Dec. 321, note; Clark & Marshall, *The Law of Crimes*, 2d ed., p. 586), but probably most courts would now hold that the offense of forgery as well as that of obtaining property by false pretenses may be committed by a device so crude that it could only impose upon the credulous or careless. (13 A. & E. Encycl. of L. 1085; 19 Cyc. 404.) But the rule as stated can not benefit the defendant here. Whether a person of ordinary observation might mistake the words "Henry Heinis" for the signature of Henry Hein was a question of fact. We can not say as a matter of law that a person of reasonable prudence might not fall into that error. The theory of the state was that the defendant forged the note in order to cover up a shortage in his own accounts with his employer, the Chicago Lumber and Coal Company. There was evidence that no one of a similar name lived or was known in the community excepting Henry Hein; that he had business

---

The State v. Chance.

---

transactions with the company which were entered in its books in the defendant's handwriting, under the designation "Henry Heinis"; that other entries apparently referring to the same person were written "Hein" and "Heins." This was sufficient to justify the jury in concluding that if the defendant signed the note he intended the signature to be regarded as that of Henry Hein, and that the fraud was not so obvious as to be necessarily harmless.

A third complaint is that the state was permitted, in support of the charge of uttering the forged note, to introduce evidence tending to show that the defendant had forged the names of other persons to other notes for the purpose of increasing the apparent assets of the business, and thus covering up his shortage. This evidence had a tendency to prove him guilty of the very offense charged, and the fact that it also tended to prove the commission of other offenses did not render it inadmissible. (*The State v. Calhoun*, 75 Kan. 259; *The State v. Hansford*, 81 Kan. 300; 62 L. R. A. 252, note; 5 Encyc. of Ev. 868; 1 Wig. Ev. §§ 315, 318.)

The final objection urged on behalf of the defendant is that after he had pleaded not guilty, but before the impaneling of the jury was begun, the state was permitted to amend the information by adding a new count thereto. The statute provides:

"An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant." (Crim. Code, § 72.)

The claim is made that this provision forbids any amendment except in matter of form after a plea is entered. Language to that effect was used in *The State v. Bundy*, 71 Kan. 779, but there the substance of the information was changed after a jury had been impaneled and sworn, and jeopardy had consequently at-



---

The State v. Chance.

---

tached. The decision was explicitly based on that consideration, and what is said in the opinion must be interpreted in the light of that fact. The force of the statute is that prior to arraignment and plea the state has an absolute right to amend in any respect, without asking permission, but that *on the trial* no amendment may be made, even by leave of court, except in matter of form. The fair inference is that after a plea has been entered, but before the trial has begun, substantial amendments may be made, but only upon order of the court. That is the rule at common law (22 Cyc. 436, 437), and the statute is not less liberal. Convictions have repeatedly been sustained based upon amended informations filed after one trial had been had. (*The State v. Hart*, 33 Kan. 218; *The State v. Spendlove*, 47 Kan. 160.) Here the defendant was again arraigned and pleaded not guilty to the amended information, and no possible prejudice could have resulted to him from the fact that the amendment was made after, instead of before, his first plea had been entered.

The judgment is affirmed.

---

THE STATE OF KANSAS, *Appellee*, v. ALVIN C. CHANCE,  
*Appellant*.

No. 16,309.

SYLLABUS BY THE COURT.

WORDS AND PHRASES—"Moneyed Corporation"—*Forgery*—*False Entries in Books of Account*. A company incorporated for the purpose of pecuniary profit, although having no power to engage in banking, or in loaning money, or in writing insurance, is a "moneyed corporation" within the meaning of that phrase as used in the section of the crimes act (Gen. Stat. 1909, § 2621) declaring one guilty of forgery who fraudulently makes false entries in the account books of an association of that description.

---

The State v. Chance.

---

Appeal from Thomas district court; CHARLES W. SMITH, judge. Opinion filed May 7, 1910. Affirmed.

*W. G. Bissell*, and *Edwin D. McKeever*, for the appellant.

*Fred S. Jackson*, attorney-general, and *E. H. Benson*, county attorney, for the appellee; *Park B. Pulsifer*, of counsel.

The opinion of the court was delivered by

MASON, J.: Alvin C. Chance was convicted under the statute (Gen. Stat. 1868, ch. 31, § 131; Gen. Stat. 1909, § 2621) forbidding the making of false entries in a book of accounts kept by a moneyed corporation. He appeals upon the ground that the Chicago Lumber and Coal Company, whose books he was accused of falsifying, being merely a mercantile organization, was not a "moneyed corporation" within the meaning of the section under which he was prosecuted, which reads:

"Every person who, with intent to defraud, shall make any false entries, or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by such corporation or its officers, and delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim or credit shall be or shall purport to be created, increased, diminished or discharged, or in any manner affected, shall upon conviction be adjudged guilty of forgery in the third degree." (Gen. Stat. 1909, § 2621.)

This section originated in New York. It was adopted by Missouri as early as 1835, and transplanted to Kansas in 1855. Mississippi also borrowed it. In no one of the four states does a prosecution under it appear to have been reported. The phrase "moneyed corporation" has been long in use in the legislation of New York, where, in the course of an elaborate classification of incorporated companies, it was early given by express enactment a peculiar meaning, limiting its appli-

cation to those companies having power to loan money upon pledges or deposits, or to make insurance. It has gained considerable currency in that sense, but evidently by reason of the statutory definition. It long ago found its way into the law dictionaries, where, however, the statute was cited as authority for the meaning given. (Bouvier's; Burrill's.) It has lately appeared in the general dictionaries. (Century; Webster's New International.)

Some provisions of the national bankruptcy act of 1867 were made applicable to "moneyed business or commercial corporations." (14 U. S. Stat. at L. p. 535, ch. 176, § 37.) The phrase quoted is usually written with a comma after the word "moneyed," and that punctuation is in accordance with the meaning intended, as appears from the fact that the original bill read "all corporations," and this was changed by amendment first to "all moneyed and business corporations," and then to its present form. (Cong. Globe, 39th Cong., part 2, p. 1002.) The courts have held that the three adjectives together cover all corporations organized for pecuniary profit, and this judicial interpretation has inadvertently been said to have been placed upon the words "moneyed corporation." (27 Cyc. 824.)

In a federal case in New York a statute of limitation of that state applying to actions against a director or stockholder of a moneyed corporation was invoked where the corporation involved was organized under the laws of Kansas. A question was raised as to what was meant by a moneyed corporation, and the supreme court in passing upon the matter showed a recognition of the fact that the New York usage was peculiar to that state and resulted from the statutory definition, saying:

"The next objection is that . . . the trust company is not a moneyed corporation within the meaning of the section in question. What is meant by the term 'moneyed corporation,' in section 394, is shown by the

---

The State v. Chance.

---

definition of that term given in 1 Rev. Stat. 598, sec. 51, where it is said: 'Section 51. The term "moneyed corporation," as used in this title, shall be construed to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances.' Although this definition refers to the meaning of the term 'moneyed corporation,' as used in that title of the revised statutes, we think it is plain that the same term used in section 394 of the code means the same thing as defined in section 51. The legislature used a term which was well known in the legislation of New York and for a long period of years a definite meaning had been given to it in that legislation, and when speaking of limitations of actions in regard to moneyed corporations nothing would be more natural than to assume that the term when thus used should have the same meaning applied to it as had been defined by the legislature when enacting legislation in regard to moneyed corporations. This legislation does not assume to enact what shall be 'moneyed corporations' in other states, but its effect is that when actions are brought in the state of New York, and the question arises whether a foreign corporation is or is not a moneyed corporation, that question will be solved in such a case as this, for the purpose of construing the statute of limitations of the state, by reference to the meaning given to the term by the legislature or courts of New York, rather than by reference to the legislation of another state under which the corporation may have been formed. The question is not what the corporation is, under the legislation of that other state, but whether what it is doing is of that description provided for and designated by the legislation of the state of New York." (*Platt v. Wilmot*, 193 U. S. 602, 610, 611.)

In *State of Texas v. Fidelity and Deposit Co.*, 35 Tex. Civ. App. 214, a statute was interpreted which provided the manner of taxing the personal estate of "moneyed corporations." In the opinion it was said:

"The expression 'moneyed corporation' was evidently intended to mean all classes of corporations organized and created for business purposes, as distinguishable from public or charitable or other corporations, which are exempted by law from taxation. This we believe

---

The State v. Chance.

---

to be the usual meaning applied and given to this expression. . . . If the expression 'moneyed corporation' is to be applied in a narrow and restricted sense, the effect would be to create a taxation upon those corporations that handle and deal in money as their business, and would exclude from the operation of the law many corporations engaged in this state in business enterprises which are doubtless as profitable to them as is the case of those engaged in the banking and money loaning business. We should apply this expression in a common-sense way, so as to reach, if necessary, the intention of the legislature; that intention, in our opinion, being, as evidenced by all the laws upon this subject, to tax the property of all corporations which has a permanent situs in this state. The expressions 'moneyed business' or 'moneyed man' are often used, and in their common acceptance and generally understood meaning we do not apply them solely to the business of handling and loaning money, or to a man whose property merely consists of money; but, as said by the supreme court of Pennsylvania, in *Jacob's Estate*, 140 Pa. St. 274, 'that the word money is properly known and used as indicating property of every description is well known. Thus it is very common to refer to a person as a 'moneyed man' because of his large possessions. Yet those possessions may consist exclusively of real estate.' " (Page 230.)

In *Upton, Assignee, v. Tribilcock*, 91 U. S. 45, it was said: "The capital stock of a moneyed corporation is a fund for the payment of its debts." (Page 47.) Plainly the word "moneyed" was not there used in the restricted sense. The particular concern involved happened to be an Illinois insurance company, but the sentence has been frequently quoted in connection with various kinds of corporations organized for profit, but having no banking, loaning or insurance powers. (*Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. 392, 395; *State Trust Co. v. Turner*, 111 Iowa, 664, 673; *Kelly v. Clark*, 21 Mont. 291, 321; *Lane's Appeal*, 105 Pa. St. 49, 60; *The Gogebic Investment Co. v. The Iron Chief Mining Co. and others*, 78 Wis. 427, 431.)

The question is not what the words "moneyed cor-

poration" mean at this time according to approved usage, but what they meant when the statute containing them was enacted. (*Clearwater v. Bowman*, 72 Kan. 92.) The New York definition was not in terms adopted by the legislature of Missouri or by that of Kansas. It can not fairly be deemed to have been adopted by implication in either state. In Missouri in 1835 there was no general law whatever in relation to corporations other than one regarding the service of summons upon them. In Kansas in 1855 there was no statutory classification of corporations according to their purposes. In neither state was there any separate class of business corporations to which the term "moneyed" applied. The section preceding that under consideration forbade the making of false entries in the records of public offices, concerning demands in favor of or against the state, or of any county, township or city, thus protecting the books of public corporations. The natural inference is that in adopting a similar provision concerning the book accounts of "moneyed corporations" the expression quoted was used in a broad popular sense, rather than with a narrow technical meaning, the purpose being to cover all private corporations having a capital stock and employing money for gain, as distinguished from those not designed for pecuniary profit, such as religious, benevolent or educational organizations.

The judgment is affirmed.

THE ALTOONA STATE BANK, *Appellee*, v. I. M. HART,  
*Appellant*.

No. 16,328.

## SYLLABUS BY THE COURT.

1. FALSE REPRESENTATIONS—*Right of Action*. False representations are actionable when made fraudulently—that is, to induce another to part with his money or property—if believed and acted upon and made with knowledge of their falsity, or when made for such purpose by one who has no knowledge upon the subject but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury.
2. ——— *Pleadings — Evidence — Special Questions — Tender*. Questions concerning the sufficiency of a petition, the competency of evidence, the practice in submitting special questions to a jury, and the surrender of notes given for money obtained by fraudulent representations, are considered.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed May 7, 1910. Affirmed.

*Howard J. Hodgson*, for the appellant.

*T. J. Hudson*, and *D. J. Sheedy*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: The appellant, Hart, sold a laundry plant to J. W. Mordy, on August 1, 1905, and took from him a chattel mortgage upon the property to secure the consideration. Mordy was at that time an employee of the appellant in the laundry, and immediately took possession of it. On June 1, 1906, he asked the bank for a loan of \$600 to pay off the mortgage. Hart went with him to the bank, and to induce its officers to loan the money stated to them that \$600 would clear the plant of all indebtedness and pay all that Mordy owed thereon, and that he (Hart) would release the mortgage on receiving that sum. He also said that the laundry was worth from \$1200 to \$1500, and was doing a good business. In the

---

Bank v. Hart.

---

course of the negotiations it was proposed that V. R. Mordy, a brother of J. W. Mordy, should join with the last-named person and his wife in signing notes for the money. As a further inducement to the bank to make the loan, Hart stated that the name of V. R. Mordy would make the notes absolutely good; that V. R. Mordy was good for the amount. Relying upon these representations, and believing them to be true, the bank, upon the release of the chattel mortgage, made the loan and took three promissory notes, signed by J. W. Mordy and wife and V. R. Mordy, for \$200 each, payable respectively in five, ten and fifteen months thereafter, and paid the \$600 to Hart. The statement that \$600 was the amount unpaid on the mortgage was untrue. After applying that amount on the mortgage, \$450 still remained due upon it, for which J. W. Mordy and wife gave their notes to Hart, but without the knowledge of the bank. About August 1, 1907, Hart took back the laundry from Mordy, surrendered the notes for \$450, and in a few days sold it to Charles Lopeman. Learning of this transfer, the bank sought payment of its notes. V. R. Mordy, the surety, refused to pay, and declared that they could not be collected. J. W. Mordy and wife had left Altoona, their former residence, and they were insolvent. V. R. Mordy was likewise insolvent.

This action was then brought by the bank against Hart and Lopeman and the Mordys for false representations in obtaining the \$600. The jury found for the plaintiff, and judgment was rendered against Hart for that amount with interest. He appeals. The Mordys made default.

In answer to special questions the jury found that the plaintiff had made no effort by legal proceedings to collect the notes; that the plaintiff had not tendered them back to Hart or the Mordys; and that J. W. Mordy and wife and V. R. Mordy were insolvent when the money was obtained.



---

Bank v. Hart.

---

The appellant, Hart, by his answer and in his testimony denied making any of the representations above stated, but the jury found for the plaintiff upon all the issues, and there was evidence to sustain the finding. The facts, substantially as stated above, having been alleged in the petition and established by the findings and verdict, must be considered as proved.

The representations that the \$600 so borrowed paid the indebtedness of J. W. Mordy, and that V. R. Mordy was financially good, were material representations. They were made to induce the bank to loan the money. They were relied upon, and the money was paid over in the belief that they were true, when in fact they were false. These facts are also established by the verdict.

False representations are actionable when made fraudulently—that is, to induce another to part with his money or property—if believed and acted upon and made with knowledge of their falsity, or when made for such purpose by one who has no knowledge upon the subject but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury. (20 Cyc. 24; *DaLee v. Blackburn*, 11 Kan. 190.) The appellant, of course, had knowledge of the amount due upon the mortgage. Whether he had knowledge of the financial condition of the surety or not, he made positive assertions as though possessed of such knowledge, the effect of which was for the jury to determine.

An objection was made to the introduction of any testimony, on the ground that the petition was insufficient to disclose a cause of action. A motion was also made for an order requiring the plaintiff to elect upon which of two supposed causes of action it relied. The petition contained a statement of facts sufficient to constitute a good cause of action for damages for fraudulent misrepresentation. It stated only one cause of action. It is true that the notes were set out and indebt-

---

Bank v. Hart.

---

edness upon them was alleged, and some other details, perhaps unnecessary to be stated, were given, but the defendant could not have been prejudiced by a mere history of the transaction. The facts constituting the cause of action were stated, and the petition was sufficient.

Complaint is made because the court permitted evidence to be given of the subsequent transfer of the plant from Mordy back to Hart, and the transfer by Hart to Lopeman. These transactions were alleged in the petition as a part of a scheme to place the property beyond the reach of the bank. The issue against Lopeman was determined in his favor, but the evidence was properly received. The finding in favor of Lopeman could not make the admission of the evidence erroneous. The testimony was proper to be considered by the jury in support of the charge of a fraudulent purpose and conspiracy. The fact that Lopeman was free from guilty knowledge does not relieve Hart, against whom the issue was determined.

The court informed the jury that the special questions were submitted by the appellant. He complains of this as indicating to the jury that he, and not the court, desired the jury to answer them. The force of this objection is not easily discoverable. Besides, the questions so submitted contained a recital that "the defendant I. M. Hart requests the court . . . to submit to the jury . . . the following special questions." The language of the court was only a confirmation of what was written on the paper handed to the jury.

Several instructions were excepted to, but when all the instructions are read together they are not erroneous.

In compliance with the request of the appellant, the jury were directed to return more definite answers to certain questions to which they had responded by answers commencing "We believe," and like expressions.

---

Bank v. Hart.

---

The court informed the jury that they could answer "yes" or "no" to these questions, which they afterward did to some of them. The appellant complains of this direction to the jury, but the court only informed the jury what form of answer would be definite, without indicating any opinion whether the answers should be negative or affirmative. The province of the jury was not invaded. The court is not bound to leave a jury without information, to grope in the darkness to ascertain in such a situation what is meant by a definite answer.

It is urged that a failure to tender back the notes before suit was fatal. The notes were in the hands of the payee after maturity, and were produced in evidence. No suggestion was made to the district court, and none is made here, that the appellant can be injured because the notes are still held by the bank. He did not ask for their surrender or delivery on payment by him of the judgment. The makers are insolvent, and upon the evidence the notes appear to be worthless. What the rights of the appellant may be with respect to the notes in case he pays the judgment is immaterial upon the issues tried.

Further comment upon the assignment of errors is unnecessary. The verdict and findings of the jury upon conflicting evidence, approved by the trial court, conclude the inquiry as to the facts, and no errors are found in the proceedings. The judgment is affirmed.

THE KELLEY & LYSLE MILLING COMPANY, *Appellant*, v.  
L. SCHREIBER, *Appellee*.

No. 16,332.

## SYLLABUS BY THE COURT.

1. PRACTICE, DISTRICT COURT—*Objections to Referee's Report—Old Code*. Under the provisions of the old code (§§ 293, 295), a report of a referee appointed by the district court could be assailed by a motion to set it aside or by proper exceptions thereto filed upon the coming in of the report, and it was not essential that exceptions be taken to errors occurring on the trial before him if such errors appeared of record.
2. ——— *New Code*. The amended code makes no provision for exceptions or for bills of exception. (Laws 1909, ch. 182; Gen. Stat. 1909, ch. 95.)

Appeal from Wyandotte district court; J. MCCABE MOORE, judge. Opinion filed May 7, 1910. Affirmed.

*Adrian F. Sherman, John H. Atwood, and W. W. Hooper*, for the appellant.

*S. I. Hale, and Angevine, Cubbison & Holt*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff sued to recover a balance alleged to be due on an account of sales of several carloads of wheat shipped to the plaintiff by the defendant, after crediting him with the market value of the wheat and charging him with drafts drawn against the same and with freight, interest and storage charges. Issues were joined and the cause was referred to a referee. The referee's report was duly filed, with his findings of fact and conclusions of law. The defendant moved to set aside the findings of fact and conclusions of law and for a new trial, and also for an order directing the referee to return all the evidence introduced at the hearing. The plaintiff filed a motion to confirm the report and for judgment in ac-

---

Kelley v. Schreiber.

---

cordance therewith. The district court ordered the referee to return the evidence, and, after this order had been complied with, denied the plaintiff's motion to confirm the report, and made an order setting aside the referee's findings and granting a new trial. The plaintiff brings the case here for review and alleges that the court erred in setting aside the findings and in granting a new trial.

The plaintiff claims that the district court had no power to review the findings of the referee, except on a bill of exceptions signed by the referee and filed in the cause. This is the only question to be determined. It is purely one of practice, and, moreover, a question which can only arise in a case tried before the amendment to the code, because the new code does away with all exceptions and bills of exceptions. Under the provisions of the code in force when the case was tried it was always considered good practice for a party wishing to except to the rulings of a referee to prepare a bill of exceptions and have the same allowed by the referee before the report was filed. (*DeLong v. Stahl*, 13 Kan. 558; *Davis v. Finney*, 37 Kan. 165; *Newton v. Toews*, ante, p. 15.) Section 295 of the code (Gen. Stat. 1901, § 4742) made it the duty of the referee to sign any exceptions taken to any order or decision made by him and return the same to the court making the reference. But the only purpose of a bill of exceptions is to preserve and present objections to rulings made during the progress of the hearing which otherwise would not appear of record, such as the admission or rejection of testimony, or like matters. No bill of exceptions, however, was necessary when there was no dispute as to what the rulings were or what the evidence was upon which they were based. This is undoubtedly true, although no cases will be found in which the court has passed upon the precise question. The referee's report could be assailed by a motion to set it aside or by proper exceptions thereto filed in the

---

Kelley v. Schreiber.

---

case upon the coming in of the report, and it was not essential that exceptions be taken to errors occurring on the trial before him, if such errors appeared of record. When the court passed upon the defendant's motion and set aside the report and granted a new trial it had before it all the evidence presented to the referee, together with his findings, and it was the duty of the court to set the report aside if the findings were not supported by the evidence or if the conclusions of law were erroneous. (*Owen v. Owen*, 9 Kan. 91; *Jones v. Franks*, 33 Kan. 497; *Chandler, Adm'r, v. Dye*, 37 Kan. 765; *Krapp v. Aderholt*, 42 Kan. 247; *Bank v. Showers*, 65 Kan. 431.) In the syllabus of *Krapp v. Aderholt*, supra, it was said:

"A referee is an officer of the court appointing him, and the court has full authority to supervise and control his report; it can set aside, and confirm, and modify the report, as the facts and the law require."

It was within the power of the court to refer the case again, either to the same or another referee, or to hold the case for trial before the court.

The plaintiff's contention is based upon a misconception of the relations between the court and the referee. The latter is merely an officer of the court, with limited powers, defined by the order appointing him. He is not a court from which an appeal lies to the district court. His report has no force or effect until it is confirmed by the court. The power exercised by the court in passing upon the referee's report is not appellate, and therefore the rule that exceptions are necessary to authorize a review by an appellate court of the rulings by a referee has no application.

The following decisions from other courts hold that exceptions may be first taken in the court which appointed the referee: *Edwards & Beardsley v. Cottrell & Babcock et al.*, 43 Iowa, 194; *Washington County v. Jones*, 45 Iowa, 260; *Hodgin v. Toler et al.*, 70 Iowa, 21; *Walton v. Walton's Estate*, 63 Ver. 513; *Abernathy v. Withers*, 99 N. C. 520.

---

Dody v. Bank.

---

It is the general rule that exceptions are not necessary where the error is apparent on the face of the record. On the contrary, some decisions will be found which hold that exceptions are necessary to raise any question as to the correctness of conclusions of law (*The Amboy, Lansing & Traverse Bay R. R. Co. v. Byerly*, 13 Mich. 439), but this is not the law in Kansas. (*Martsolf v. Barnwell*, 15 Kan. 612; *Cemetery Association v. Hanslip*, ante, p. 20.) For the purpose of such a review the evidence is not necessary, as the findings of fact are taken as true. (*Cemetery Association v. Hanslip*, supra.)

It is not deemed necessary to consider any of the other questions discussed in the briefs, as the judgment granting a new trial must be affirmed.

---

W. A. DODY, *Appellant*, v. THE STATE BANK OF COMMERCE, *Appellee*.

No. 16,344.

SYLLABUS BY THE COURT.

**DAMAGES—Attachment of Money—Loss of Profits—Injury to Credit.** In an action to recover damages for the wrongful attachment of money and notes by way of garnishment, where there is no malice nor grounds for the recovery of exemplary damages, the measure of damages is interest on the money and notes during the time they were held under the garnishment process and the necessary expenses incurred in regaining possession of the property. Neither the loss of prospective profits in the general business of the owner because a part of his property was garnished nor injury to his credit are elements of damage.

Appeal from Marion district court; OSCAR L. MOORE, judge. Opinion filed May 7, 1910. Affirmed.

W. H. Carpenter, for the appellant.

H. S. Martin, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action to recover damages for the wrongful garnishment of the funds and property of appellant. It was alleged that the State Bank of Commerce filed an affidavit for attachment and caused a garnishment summons to be issued and served on the Marion State Bank, thus tying up a deposit of appellant in that bank, as well as two promissory notes, and that when certain checks on the deposit which came into the hands of the State Bank of Commerce prior to the garnishment proceeding were presented they were necessarily refused. It was alleged, too, that when the garnishment proceeding was tried the district court decided in favor of appellant, dissolving the garnishment, and that upon appeal this decision was affirmed. (*Bank v. Dody*, 71 Kan. 98.) In the present action the court instructed the jury that appellant was entitled to recover any damages necessarily incurred in releasing his property from the garnishment—that is, he could recover, first, his personal expenses, including the value of his time, if any had been proven; and, second, he could recover a reasonable attorney's fee incurred by him in securing the release of his property, and the necessary expenses of his attorney; and, third, he might recover the interest upon the money, as well as the value of the property impounded by the garnishment. In the findings the jury allowed him \$245.35 as interest on the notes; \$185.40 as interest on the money; and \$80 as attorney's fees. Appellant, who was a country merchant and also engaged in the cattle business, insisted that he had sustained a loss of profits by reason of the wrongful garnishment, and also that his credit was impaired by the same cause, for both of which he was entitled to recover. The court, however, instructed the jury that these things were too remote, speculative and uncertain to form the basis of a recovery, and of this ruling complaint is made.



---

Dody v. Bank.

---

In this there was no error. No malice was shown, and there was no claim that appellant was entitled to exemplary damages. In the absence of malice appellant was entitled to the actual damages resulting from being dispossessed of his property during the time it was detained, together with the necessary expenses incurred in gaining possession of the same. As the money and notes were restored to him, the material injury suffered was the deprivation of their use while they were impounded by the garnishment. If there had been deterioration, a loss of part, or some special damage proximately and naturally resulting from the garnishment, this might have been recovered; but, in view of the character of the property and of the fact that all taken was recovered, the value of the use as well as the necessary expenses was a fair measure of damages. The injury to credit and the loss of profits in appellant's general business, alleged to have arisen from the tying up of some of his capital for a time, are collateral disadvantages and are too speculative and remote to afford a basis for assessing damages. While the authorities are not uniform, they are generally to the effect that the loss of prospective profits is not an element of damage in cases of this kind. In some instances, where the loss of profits is the direct and proximate result of a wrong, and it can be measured with certainty, it is allowed. For instance, in *Hoge v. Norton*, 22 Kan. 374, where a herd of cattle was wrongfully attached and placed in an inferior pasture and given improper care, which operated to prevent the ordinary increase in weight and value, and where the loss was the direct result of the wrong and was susceptible of reasonably certain measurement, it was held that the gains so prevented might be recovered. In somewhat similar cases the same measure has been employed. (*Brown v. Hadley*, 43 Kan. 267; *Enlow v. Hawkins*, 71 Kan. 633; *Gas Co. v. Bailey*, 77 Kan. 296.) Other cases furnish examples of losses of profits which were deemed to be too

---

Dody v. Bank.

---

remote, contingent and uncertain to warrant their allowance. (*M. K. & T. Rly. Co. v. City of Fort Scott*, 15 Kan. 435; *Walrath v. Whittekind*, 26 Kan. 482; *Harvester Works Co. v. Cummings*, 26 Kan. 367; *Gas Co. v. Glass Co.*, 56 Kan. 614; *States v. Durkin*, 65 Kan. 101; *Railway Co. v. Thomas*, 70 Kan. 409.)

The appellant was a merchant, and was also engaged in carrying on a farm as well as the cattle business. How far the detention of the money and notes may have lessened his profits as a merchant, farmer and stockman is largely a matter of conjecture. How much of the losses in his general business was attributable to a tying up of a part of his capital and how much to other causes would have taken the jury into the region of speculation. It is altogether too remote and uncertain to form a safe basis of recovery, and the same is true of the alleged injury to credit. (*Casper v. Klippen*, 61 Minn. 353; *Union National Bank of Chicago v. Cross and another*, 100 Wis. 174; *Myers v. Farrell*, 47 Miss. 281; *Trawick v. The Martin Brown Company*, 79 Tex. 461; *Mitchell v. Harcourt et al.*, 62 Iowa, 349; *Davidson v. Oberthier*, 42 Tex. Civ. App. 337; *Crymble v. Mulvaney*, 21 Colo. 203; 4 Sutherland Dam., 3d ed., § 1101; see, also, monographic note to *Tisdale v. Major*, 68 Am. St. Rep. 266, 272.)

The value of the use of the property may be recovered, and where, as here, it consisted of money and notes that were withheld from appellant, the interest thereon from the time they were detained under the garnishment is a fair measure of such value. Appellant invokes the rule of liability which is applied where a bank refuses to pay money to a depositor, but as appellant had no deposit with appellee that rule does not apply.

In its cross-petition in error appellee complains of a ruling of the trial court as to the allowance of attorney's fees, but as its proceeding was brought under the old code, and not within a year from the time the motion

---

Davis v. Nation.

---

for a new trial was denied and the final judgment rendered, this complaint is not open to our consideration.

The judgment of the district court is affirmed.

GRAVES, J., not sitting.

---

J. M. DAVIS, *Plaintiff*, v. JAMES M. NATION, *as Auditor, etc., Defendant.*

No. 16,366.

SYLLABUS BY THE COURT.

**LIMITATION OF ACTIONS—*Purchaser of School Land—Validity of Statute.*** Section 4 of chapter 373 of the Laws of 1907 (Gen. Stat. 1909, § 7695), providing that no action shall be brought by any purchaser of school land or by his assignee to enforce his right to an interest therein unless the same be brought within six months from the time the act takes effect, is not unconstitutional on the ground that it fails to give a reasonable time within which to begin such action.

Original proceeding in mandamus. Opinion filed May 7, 1910, Writ denied.

*Richard E. Bird*, for the plaintiff.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, and *Charles D. Shukers*, special assistant attorney-general, for the defendant.

The opinion of the court was delivered by

PORTER, J.: This is an original proceeding in mandamus to compel the state auditor to issue patents to certain school land in Meade county. J. M. Davis, the plaintiff, is an assignee of the original purchasers, and has paid the full amount due on the original contracts. The auditor refuses to issue the patents because it is claimed that the rights of the original purchasers, through whom the plaintiff claims, were forfeited for

the nonpayment of interest. He sets up as a further defense that the action is barred by the limitations of the law of 1907. In our opinion the action is barred by the limitations contained in section 4 of chapter 373 of the Laws of 1907 (Gen. Stat. 1909, § 7695), which reads:

“No action shall be brought by any purchaser of school land, or by the assignee of such purchaser, in any court of this state, to recover any tract of school land, or to enforce the purchaser’s right to or interest in the same, when a forfeiture thereof has been declared, unless such action be commenced within six months after such forfeiture was declared, or, when such time has already elapsed, within six months after this act takes effect.”

The act took effect January 25, 1907, and this action was not commenced until more than six months thereafter. The plaintiff questions the constitutionality of the act, and claims that it infringes on his vested rights because it fails to give a reasonable time within which to begin his action. The plaintiff does not indicate what he would regard as a reasonable limitation, and cites no cases in support of his claim that six months is unreasonable. We have no hesitation in declaring that a six months’ period, allowed by the act, is a reasonable limitation. (*Plow Co. v. Witham*, 52 Kan. 185, 192; *National Bank v. Clark*, 55 Kan. 219, 224.) This is an action brought by the assignee of a purchaser of school land to enforce his interest in the same, and, therefore, comes within the limitation.

The only remaining question is whether a forfeiture of the school land had been declared. The evidence shows that there was an attempted forfeiture. The tax rolls in the treasurer’s office showed the land to be forfeited and not subject to taxation; and the former sheriff testified that he served notices of default for nonpayment of interest, although if a return in writing was ever made it was not filed in the office

---

Hotham v. Berry.

---

of the county clerk. This, with the other evidence showing that patents had been issued to the purchasers, was sufficient evidence that a forfeiture had been declared. It must be observed that the question of the validity of the forfeiture proceedings is not involved. That is the question which the plaintiff is barred from litigating. Since the action can not be maintained because of the limitation of the act of 1907, the writ is denied.

---

J. C. HOTHAM, *Appellant*, v. E. H. BERRY, *Appellee*.

No. 16,368.

SYLLABUS BY THE COURT.

1. SURETYSHIP—*Contribution—Payment of Debt Before Maturity.* Where two persons become sureties upon a promissory note, and one of them pays the note two days before maturity, the principal having been for some time and being then and for some time afterward unable to pay, such premature payment will not of itself relieve the other surety from contribution.
2. ——— *Payment by Another—Money Furnished by Plaintiff.* In such a case, where one of the sureties furnishes the money to pay the note and intrusts it to another, to be used for that purpose, and such other for his own purposes obtains the check of a third person in exchange for the money received from the surety, and with such check pays the note, such payment will not, because made in that manner, release the other surety from contribution.

Appeal from Atchison district court; BENJAMIN F. HUDSON, judge. Opinion filed May 7, 1910. Reversed.

*James W. Orr, W. P. Waggener, and J. M. Challiss,*  
for the appellant.

*J. L. Berry,* for the appellee.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced in the district court of Atchison county, by the appellant, to compel contribution from the appellee for money paid by the appellant in the discharge of promissory notes upon which they were cosureties. The plaintiff was not satisfied with the judgment of the district court and appeals. The case was tried upon the written statements of the witnesses, and the same testimony is presented here. The notes were executed by J. W. Buis, as principal, to George Storch, as payee, and by J. C. Hotham and E. H. Berry, the parties hereto, as sureties. There were four notes, all dated March 30, 1903. One, for \$200, was payable four months after date; another, for \$200, was payable six months after date; the other two, one for \$334.70 and one for \$65.30, were each payable nine months after date. The last-named note was payable to Oscar Lips, as payee, instead of George Storch.

About the time the first note became due, the principal being unable to pay it, the plaintiff furnished the money with which it was paid. It is claimed that the payment was made two days before it became due, and the district court so found, and upon this finding held that it was a payment before default by the principal and operated as a release of the cosurety from contribution.

As we understand the law of contribution, it is founded upon the rules of equity. Cosureties have, under these rules, been held to share the burdens of the obligation equally, except where the rule of equality has for some substantial reason been broken. No mere technical legal rule should be permitted to override the rules of justice and fairness which have always been recognized as existing between sureties. Under the circumstances, we think the time of payment immaterial. It was evident some time before the payment

---

Hotham v. Berry.

---

by the plaintiff that Buis, the principal, would be unable to pay the note at maturity. It was apparent that nobody's rights could be injuriously affected by payment two days before maturity, and it has been since shown that no harm was done by this premature payment. It would have been a vain and useless thing for the plaintiff to have waited until the expiration of the two days upon the possibility that the principal, who was known to be hopelessly unable to pay, might not make default. The law does not require the performance of a vain and useless act. Berry, the co-surety, lost nothing by the plaintiff's prompt action. Why the defendant should be released from the performance of his obligation to pay his proportion of this joint liability we are unable to see. No reason has been suggested. It seems to us to be a case where a naked technical rule of law is invoked to avoid the performance of a just and equitable duty. No fair and reasonable excuse has been stated for this refusal to pay.

We also think that the plaintiff ought to be credited with the payment of the last two notes. While the check of the DeKalb Telephone Company was actually used to make the payment, it was simply the form which the money furnished by the plaintiff had reached by exchange. The check was by every reasonable intentment the property of the plaintiff, and the mere fact that the money while on its way from the hands of the plaintiff to Storch had become transferred into this check does not change the real; substantial fact that the plaintiff's money paid the notes. The telephone company was under no obligation to pay these notes, and the check was issued by it because of the benefit it had received from the money furnished by the plaintiff. The money of the plaintiff in this round-about manner paid the debt of the defendant. It seems that under the equitable considerations by which the relations between sureties are supposed to be con-

---

Hotham v. Berry.

---

trolled no just reason exists for the technical distinction drawn by the defendant between direct payment by the plaintiff, made personally, and payment by another for him with a check obtained with his money from a third person. The fact remains that the debt was paid, and that the plaintiff furnished the money by which it was extinguished.

The defendant does not seem to have any just cause of complaint because the plaintiff did not personally pay Storch with cash out of his own hand. It does not seem just that this whole burden should be borne by the plaintiff and that the defendant should escape from the performance of his fair and just portion thereof. It has been said that one surety can not require contribution from another until the debt has been actually paid, and yet, as a general rule, one cosurety may enforce contribution from another without having paid anything, if by some arrangement with the creditor he has assumed and satisfied the debt of his principal. In this way equity regards the substance of the transaction and ignores its form. (1 Brandt Sur. & Guar., 2d ed., § 254.)

The conclusions here reached will make it unnecessary to consider other questions discussed by counsel. The judgment of the district court is reversed, with direction to enter judgment in favor of the plaintiff against the defendant for an amount equal to one-half the gross sum paid by the plaintiff, less payments made to him by Buis.



---

Doty v. Maddux.

---

DENNIS D. DOTY, *Appellant*, v. J. W. MADDUX *et al.*,  
*Appellees*.

No. 16,373.

SYLLABUS BY THE COURT.

TAXATION—*Lien for Taxes—Purchaser of a Void Tax Deed.*

After the tax roll of 1888 had been delivered to a county treasurer an assessment upon two lots for building a sidewalk in a city of the second class was certified to the county clerk, who certified it to the treasurer, who entered it upon the tax roll against each lot thus: "S. Walk 6025." Other taxes upon the property for that year were paid in due time, but each lot was sold at the tax sales of 1889 for a delinquent sidewalk tax of \$60.25, and in 1893 a tax deed was issued thereon to the assignees of the certificate, who were in possession under it when this suit was brought by the owner of the lots for possession. The tax deed was void upon its face. Judgment was rendered for the plaintiff for possession, but a lien was given to the defendants for all taxes paid, with interest and costs. *Held*, that the plaintiff, who appealed from the judgment allowing the lien for taxes, should not be relieved therefrom.

Appeal from Finney district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Affirmed.

*A. Hoskinson, R. W. Hoskinson, W. R. Hopkins, and R. J. Hopkins*, for the appellant.

*William Easton Hutchison, and C. E. Vance*, for the appellees.

The opinion of the court was delivered by

BENSON, J.: The plaintiff, Doty, in an action of ejectment sought to recover lots 6 and 7, in block 7 in Garden City, from the defendants, Maddux and Jessup, who were in possession under a tax deed. Judgment was rendered for the plaintiff, but the defendants were given a lien for taxes, the tax deed being set aside as void upon its face. The plaintiff ap-

## Doty v. Maddux.

peals from the judgment awarding a lien for taxes paid, with interest and costs.

The land was regularly assessed for taxation for the year 1888. On December 28, 1888, payment for one-half of the taxes, \$10.97, was made, and a receipt in the usual form was given by the county treasurer. On June 18, 1889, payment was made for the remaining one-half of such taxes and the usual receipt was given. A tax deed was issued for these lots and other property, dated January 7, 1893, reciting the sale of the lots in question at the tax sales of 1889, for the unpaid taxes of 1888. The tax-sale certificate upon which the deed was based recites an unpaid tax of \$60.25 on each lot for the year 1888, and that the property was bid off to a purchaser for that sum. The tax roll of 1888 contains the following entries concerning these lots:

Lot	Block	Subd	Value - assess-	No of Acres	Total Tax	Balance	Date of Payment	No of Acres	Semi- annual Payments	Penalties		Total Payments	Delinquent	No of Sale	1889 Tax Sale to whom sold
										Dec 21	Jun 21				
6	7		3.50	9.8	2.194		Dec 20, 88 June 14, 89	724 1436	1017 1097	S. Walk		6025		394	Finnup
7	"		3.50	"	2.194		" "	"	"	S. Walk		6025		395	Finnup

The register of tax receipts, under the proper headings, shows the payment of the taxes (\$21.94), in semiannual payments, as entered in the tax roll.

The person who was county clerk in the year 1888 testified that the tax roll of that year was in the handwriting of his deputy, except the entries "S. Walk" and "6025," and that such entries were not upon the roll when it was turned over to the treasurer. This witness also testified that sidewalk taxes were certified to him at different times in the year 1888, which he certified to the county treasurer, and that it was his custom so to certify such taxes after the tax roll had been delivered to the treasurer. The evidence also

shows that the entries referred to, "S. Walk" and "6025," are in the handwriting of the person who was county treasurer at that time.

From the foregoing it may be fairly found that the authorities of Garden City certified sidewalk taxes upon these lots to the county clerk in the year 1888 after the tax roll of that year had been delivered to the treasurer; that the county clerk certified such taxes to the county treasurer, who thereupon made the entries referred to, which appear in red ink; that these entries were intended to represent a sidewalk tax on each lot for \$60.25; and that the lots were sold therefor, as recited in the tax certificate and tax deed.

The mayor and city council had authority to make assessments for sidewalks against the lots and certify the same to the county clerk (Laws 1905, ch. 116, § 1; Laws 1872, ch. 100, § 43; Laws 1876, ch. 34, § 82; Gen. Stat. 1909, §§ 1374, 1387, 9388), and the county clerk is required to make up the tax roll, attach his certificate thereto, and deliver it to the county treasurer on the first day of November in each year. (Laws 1909, ch. 244, § 1; Gen. Stat. 1909, § 9390.) The county clerk is authorized to correct errors in the description or quantity of lands on the tax roll before or after it has been delivered to the treasurer. (Laws 1876, ch. 34, § 53; Gen. Stat. 1909, § 9329.) He is also authorized to place upon the roll, after its delivery to the treasurer, property which is about to be removed and which has not been assessed. (Laws 1899, ch. 248, § 8; Gen. Stat. 1909, § 9240.) In the case of a false statement or refusal to give a statement of personal property for taxation the clerk, upon due notice and proceedings taken, is authorized to charge the proper person upon the tax roll therefor. (Laws 1876, ch. 34, § 70; Gen. Stat. 1909, § 9381.) He is also authorized to assess any real property which the assessor has omitted. (Laws 1876, ch. 34, § 52; Gen. Stat. 1909, § 9328.) Referring to some of these provisions, and to the sec-

tion providing that taxes shall become a lien on the first day of November (Laws 1876, ch. 34, § 85; Gen. Stat. 1909, § 9391), it was said in *Ritchie v. Mulvane*, 39 Kan. 241:

“Observe the foregoing language: ‘A lien for all taxes shall attach to the real property *subject to the same*.’ No reference is here made to any assessment. This means that whenever a tax is levied and the first day of the next November has arrived a lien shall attach to all property subject to the tax, whether any assessment has yet been made or not. If no assessment has yet been made, the county clerk may make it afterward. (Tax Law, §§ 18, 52, 53, 54, 70.) Of course the amount of the lien can not be ascertained until some assessment or valuation of the property is made, but the county clerk can make it at any time. It will be seen that the law is careful to prevent the escape from taxation of any person. All must bear their fair share of the public burdens; and no one is permitted to escape taxation merely because of some irregularity in the assessment or elsewhere. All must pay their taxes.” (Page 252.)

No irregularity in the assessment roll or proceeding, or mere irregularities of any kind, will invalidate tax proceedings. (Laws 1876, ch. 34, § 139; Gen. Stat. 1909, § 9481.) The public must not be deprived of its revenue or the citizen escape his fair share of the public burden through such irregularities or omissions. If one parcel of property is released of its share, the amount must be added to the property of others who are already charged with their due proportion. The failure of the county clerk to make the proper entries upon the roll at the proper time were irregularities. It was also an irregularity for the treasurer to make such entries. But these irregularities will not relieve the plaintiff from paying his taxes. The evidence was sufficient *prima facie* to show that the assessment had been made and had been duly certified to the county clerk, and that it should have been entered on the tax roll and collected. The fact that the entry was made

---

Morrison v. Pence.

---

by the treasurer instead of the clerk could not prejudice the plaintiff.

Whether the sidewalk tax had been entered upon the roll before the payment of the other taxes the evidence does not show, and we may presume that it was entered afterward. Still the plaintiff had ample notice by the publication of delinquent sales, as well as by the improvement of his property, that the tax existed. He has no equitable claim to have the lien removed and the burden cast upon other taxpayers.

The judgment is affirmed.

---

EDWARD MORRISON, *Appellant*, v. THOMAS H. PENCE,  
*Appellee*.

No. 16,376.

SYLLABUS BY THE COURT.

1. FALSE IMPRISONMENT—*Definiteness of Officer's Answer Justifying Arrest—Statement of Offense and Grounds for Arrest.* The failure of an officer, in his answer justifying an alleged illegal arrest and detention, to state particularly the offense with which the plaintiff was charged and the grounds for which the arrest was made is not material error, where it appears that the plaintiff was fully informed as to the nature of the charge and the cause of his arrest and was not deprived of any right because of a lack of such information.
2. — *Authority of Officer—Appointment—Confirmation—Oath—Commission—Signature to Oath.* A city marshal was regularly appointed and confirmed by the mayor and council and was sworn into office by a competent officer, but no commission was given to him, nor did he subscribe to an oath. He entered upon the discharge of his duties and later arrested, without a warrant, one who was committing a public offense in his presence. *Held*, that the failure of the officer to receive a commission and to subscribe to an oath did not diminish his authority, nor prevent him when sued for false imprisonment from justifying the arrest on the ground that he was an officer.

---

Morrison v. Pence.

---

Appeal from Gray district court; GORDON L. FINLEY, judge. Opinion filed May 7, 1910. Affirmed.

*L. A. Madison, and B. F. Milton, for the appellant.*

*Thomas A. Scates, and Albert Watkins, for the appellee.*

The opinion of the court was delivered by

JOHNSTON, C. J.: Edward Morrison, who owned and operated a livery barn in Cimarron, staked down a mare on a railroad right of way which was used as a street and which was in plain view of the principal hotel in the city. His declared purpose was to cure the mare of the habit of lying down when they attempted to drive her past the barn. The mare was thrown to the ground, her head staked down, her feet were stretched out and each tied to a stake, and in this position she was left for about thirty minutes. There was a city ordinance which, among other things, prohibited the obstruction of streets, the disturbance of the peace, and the cruel treatment of animals. Complaint was made by a number of citizens of the action of Morrison in staking down the mare, and he was told of the complaints and of a contemplated arrest by the city marshal. When the marshal came up he asked him to unloose the mare, and this Morrison refused to do. Three or four such demands were made and refused, when the marshal arrested Morrison without a warrant, and after some resistance compelled him to go to the courthouse, and, not finding the police judge there, Morrison was released. To recover damages for the arrest and imprisonment Morrison brought this action against Pence, the marshal. In his answer Pence alleged that he was the duly appointed and acting marshal of the city; that the arrest was made by him in that capacity, without violence, and that no more force was used in making the arrest than was necessary, and that the force actually used was due to the resistance made by

---

Morrison v. Pence.

---

Morrison. The verdict of the jury was in favor of Pence, and Morrison complains of several rulings made during the trial.

A motion was made by appellant to require appellee to make his answer more definite and certain by stating particularly the offense for which the arrest was made, but the motion was denied. In this respect the answer was incomplete. The appellee, who was asserting that the arrest was not unlawful, should have informed appellant of the cause of the arrest—that is, that he found the appellant in the act of committing an offense, and was therefore warranted in making the arrest, with or without a warrant. The motion might very well have been allowed, but the testimony discloses that appellant knew well enough the cause of the complaint against his action and the ground for his arrest. It is plain that there was no lack of information why the marshal took him into custody, and there was no limit to the scope of the inquiry because of the incomplete answer. It is only prejudicial error that justifies the reversal of a judgment.

There is also complaint of an instruction by the court to the effect that appellee, as marshal, had the right to arrest upon view, without a warrant, any person found violating any ordinance of the city. In this connection it is contended that appellee was only a *de facto* city marshal, and that as such he can claim no privilege or protection because of his office. The trial court in its charge referred to the marshal as a *de facto* officer, but it appears that he was that and more too. He was appointed by the mayor and his appointment confirmed by the city council, and a record of the same was made. He was then sworn into office and assumed the performance of his duties, but it does not appear that a formal commission was issued to him or that he subscribed to a written oath. His title to the office was not affected by the lack of a commission. It was the appointment and confirmation which

conferred the right to the office, and the commission is only evidence of that right. He should have subscribed to the oath of office which he took, as that, too, furnishes evidence that he was sworn into office. He was regularly appointed and confirmed, and therefore clothed with all the authority which the mayor and council could confer on him, and when he was sworn into office there was a substantial compliance with the law. From that time he was required to perform the duties of the office and entitled to plead his official character when his acts were challenged. The omissions mentioned would not have excused him if he had failed to preserve the peace, enforce the law or arrest one who committed a public offense in his presence. The public has an interest in the performance of duties of the character mentioned and also in the officer having the protection of the law in the performance of such duties. The right to justify as an officer is not for the benefit of the officer alone, and in this instance his justification did not rest merely upon the fact that he was an officer but upon the added fact that he did that which the law required of him, namely, to arrest appellant when he found him committing an offense which made him subject to arrest and prosecution.

We find nothing prejudicial in the rulings on the instructions, and the evidence appears to be sufficient to sustain the verdict and judgment. The judgment is affirmed.



M. E. McNUTT *et al.*, Appellees, v. JOHN L. NELLANS, Appellant.

No. 16,383.

SYLLABUS BY THE COURT.

1. SPECIFIC PERFORMANCE—*Doubtful or Unmarketable Title*. Equity will not compel a purchaser under an executory contract for the sale of land to accept the title if doubtful or unmarketable.
2. ——— *"Doubtful" Title Defined*. A title is doubtful if it exposes the party holding it to the hazard of litigation.
3. ——— *Vendor's Title Held Doubtful*. In an action to recover money paid on the purchase price of land, on account of the failure of the vendor to furnish an abstract showing clear title, it appeared that the vendor's title rested upon a deed executed by a foreign assignee solely by virtue of an order of a court in the state of Iowa. Before the action was tried the vendor obtained a judgment quieting his title, upon service by publication, against the foreign assignor, the assignee and the party to whom the assignee had conveyed, and asked for specific performance against the plaintiff. *Held*, that the title tendered is so doubtful that the plaintiff should not be compelled in equity to accept the same.
4. CONTRACTS—*Action to Recover Money Paid—Prayer by Defendant for Specific Performance—Estoppel to Assert Invalidity of Contract—Homestead—Joint Consent*. In such an action, where the defendant answers alleging a full compliance with the terms of the contract and asks for specific performance and judgment for the balance of the purchase money, and offers proof showing the execution by himself and wife of a deed conveying the land to the plaintiff, he is estopped to claim in the same action that the contract for the sale of the land is void on the ground that the land comprises a homestead occupied by himself and wife and that the wife failed to join in the contract.

Appeal from Decatur district court; WILLIAM H. PRATT, judge. Opinion filed May 7, 1910. Affirmed.

J. F. Peters, for the appellant.

L. C. Uhl, and L. C. Uhl, jr., for the appellees.

The opinion of the court was delivered by

PORTER, J.: The McNutt brothers sued John L. Nellans to recover \$500 paid him on a contract for the purchase of 160 acres of land in Decatur county, alleging a failure on his part to furnish an abstract showing a clear title, according to the terms of the contract. The defendant contended that he had fully complied with his contract, and asked for specific performance and a judgment against the plaintiffs for the balance of the purchase price and damages. The court found the facts and conclusions of law separately, and gave judgment for the plaintiffs. The defendant appeals.

The contract for the sale of the land was made April 11, 1907. At that time the plaintiffs paid the defendant \$500, and agreed to pay the balance of \$5500 July 1, 1907, when the deed and abstract of title were to be delivered. The deed to the land was executed by the defendant and his wife in June, and deposited in a bank agreed upon as a depositary. At the same time the abstract of title was sent to the plaintiffs, who retained it until July 15, when it was returned with a request for certain affidavits and requiring the payment of taxes. These requests were complied with sometime in July. The abstract showed title in the Lewis Investment Company, of Des Moines, Iowa, which took a conveyance of the fee October 12, 1889. Afterward, in 1895, the investment company, which was a corporation organized under the laws of the state of Iowa, made a voluntary assignment for the benefit of its creditors. On the first of June, 1897, the assignee obtained an order of the district court of Polk county, Iowa, authorizing him to convey the land in question, and the title of the defendant rests upon a deed executed by the assignee solely by virtue of the order of the Iowa court.

August 3, 1907, the attorneys for the plaintiffs notified the defendant that the abstract was not sufficient, for the reason that it failed to show a decree or order of

a Kansas court authorizing the foreign assignee to convey the land. In the same letter the defendant was notified that unless the abstract was perfected in this respect on or before August 8 the contract would be terminated and the plaintiffs would demand the return of the \$500.

There is no serious contention here that the deed of the foreign assignee conveyed any title. (*Thompkins v. Adams*, 41 Kan. 38; *Watson v. Holden*, 58 Kan. 657.) The defendant concedes that his title was defective, but insists that he was entitled to a reasonable time within which to perfect it. In this we concur; and it may be said that the five days given him by the letter of August 3 was not a reasonable time to perfect his title. (*Bell v. Sternberg*, 53 Kan. 571, 574.) The main contention of the defendant is that before the judgment was rendered in this action he had commenced a suit in the same court to quiet his title, and had obtained a judgment which perfected it; and the court finds that such suit was duly commenced, that service was obtained on the several defendants therein by publication, and a decree was duly rendered quieting the title in the defendant. That decree was rendered on the 18th day of October, 1907, several months before the judgment in this case, and the defendant relies upon the doctrine that equity will not relieve against a sale of land for a defect in the title of the vendor if at the time of the decree he is able to make a good title. The soundness of the general rule may be granted. (*Frederick v. Birkett*, 37 Kan. 536; *Bell v. Sternberg*, supra.) But equity will not, by a decree for specific performance, compel a party to accept a title which is so doubtful that it may be exposed to litigation. The court will not cast upon him the risk of litigation and the embarrassment of a questionable title. (*Townshend v. Goodfellow*, 40 Minn. 312; *Daniel v. Shaw*, 166 Mass. 582; *Conley v. Finn*, 171 Mass. 70; 26 A. & E. Encycl. of L. 111; *Vought et al. v. Williams*, 120 N. Y. 253; *Morri-*

*son v. Waggy et al.*, 43 W. Va. 405; *Fleming et al v. Burnham et al.*, 100 N. Y. 1; *Simon v. Vanderveer*, 155 N. Y. 377.)

The objection which the plaintiffs still make to the title is that the judgment was rendered upon service by publication and may be vacated at any time within three years. The doctrine, however, is established by numerous decisions that the title of a purchaser in good faith who relies upon a judgment quieting title to the land in his grantor can not be affected or disturbed by the vacation of the judgment, but is protected by the express provisions of the statute. (Civ. Code, § 77; Gen. Stat. 1901, § 4511; Code 1909, § 83; *Howard, Adm'r, v. Entreken, Adm'r*, 24 Kan. 428; *Loan Co. v. Cable*, 65 Kan. 306; *Randall v. Barker*, 67 Kan. 774.) If, therefore, the plaintiffs had taken a conveyance from the defendant their title would not be affected by the vacation of the judgment, provided they could prove that they purchased in good faith and in reliance upon the judgment. But could they establish their innocence as purchasers in the face of a record disclosing that they had objected to the title for the same defect, both before and after the judgment, and had finally accepted it, not in reliance on the judgment, but because compelled to do so by the decree of a court in another proceeding to which none of the defendants in the first action was a party? Moreover, the title they agreed to accept by the terms of their contract was to be a clear title, not a doubtful one which might ultimately be made clear by litigation.

There is another feature of the judgment which, though not suggested in the briefs, in our opinion adds to the doubtful character of the title. The judgment binds no one except those who were parties to it and their privies. The court finds that the only defendants were the Lewis Investment Company, Nelson Royal, its assignee, and H. Gardner Talcott, to whom the assignee conveyed the land. While the foreign assignee and all creditors of the assignor who participated in the

assignment are bound by the judgment, so far as the rights of a purchaser relying upon it are concerned, it binds no one else. Creditors of the assignor who were citizens and residents of Kansas and who did not participate in the assignment would not be bound by the judgment; and whether there were such creditors does not appear.

It is manifest, therefore, that the title is not free from reasonable doubt. Whether courts shall decree specific performance always rests in their sound judicial discretion, and where the title is doubtful the vendee will not be compelled to take it. In determining whether a title is so doubtful that equity will refuse to compel a purchaser to accept it the court is not required to pass upon the validity of the title itself; the parties whose possible claims may affect the title are not before the court, and no judgment which the court could render would bind them. It is a general rule that under a contract for a clear title equity will not compel the acceptance of a title which is not a marketable one. A marketable title in equity is one in which there is no doubt involved, either as to matter of law or fact. (Maupin Mark. Title to Real Estate, 2d ed., ch. 31; *Herman v. Somers et al.*, Appellants, 158 Pa. St. 424; *Fleming et al. v. Burnham et al.*, 100 N. Y. 1; *Vought et al. v. Williams*, 120 N. Y. 253.)

"And every title is doubtful which invites or exposes the party holding it to litigation. . . . If there be a color of an outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say that it is so, a purchaser will not be held to take it, and encounter the hazard of litigation with an adverse claimant." (*Speakman v. Forepaugh*, 44 Pa. St. 363, 371.)

The defendant set up as a further defense that the land in controversy is a homestead occupied by himself and his wife, and contends that because his wife did not join in the contract of sale it was void, relying upon the doctrine of *Thimes v. Stumpff*, 33 Kan. 53, and *Hodges*

*v. Farnham*, 49 Kan. 777, where it was held that money given in part payment of an agreement to convey a homestead, in which contract the wife does not join, can not be recovered back by the purchaser. The defendant is not in a situation to take advantage of this doctrine of the law. He can not be permitted to blow hot and cold—to seek the specific performance of a contract and in the same action claim that the contract itself is void. Besides, his wife joined with him in the execution of the deed, and, so far as the record shows, makes no objection to carrying out the terms of the contract.

The court's findings that the plaintiffs had fully complied with their part of the contract and that the defendant had failed to furnish an abstract showing clear title were sustained by the evidence, and it necessarily follows that the plaintiffs were entitled to recover the purchase money paid.

The judgment is affirmed.

---

RIVERSIDE TOWNSHIP, *Appellee*, v. ROBERT L. BAILEY  
*et al.*, *Appellants*.

No. 16,407.

SYLLABUS BY THE COURT.

1. DEMURRER—*Petition Containing Several Counts—Sufficiency of Each Count.* Where a pleading consists of more than one count each count must, as against a general demurrer, be considered as if standing alone and constituting the entire pleading.
2. ——— *Same.* In such a case neither facts involved in the action nor the averments of another count, unless incorporated by reference into the pleading demurred to, can properly be considered upon such hearing.
3. WAIVER—*Erroneous Denial of New Trial—Refusal of Applicant to Specify Errors.* Where, upon the hearing of a motion for a new trial, the court requests the applicant to

---

Riverside v. Bailey.

---

point out specifically the defects complained of, and such applicant declines and neglects to do so, such failure will be regarded as a waiver of any error committed by the court in denying such motion.

Appeal from Trego district court; JACOB C. RUPENTHAL, judge. Opinion filed May 7, 1910. Affirmed.

*A. D. Gilkeson, and E. H. Hogueland*, for the appellants.

*John E. Hessin*, for the appellee.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced by the township of Riverside, Trego county, in the district court of that county, to recover moneys received by defendant Bailey as township trustee and not accounted for. The action was upon the official bond of the trustee, Robert L. Bailey, and his sureties, C. P. True and John W. Green. Upon the trial a verdict was returned against the defendants for the sum of \$326.69, and a judgment was entered accordingly. From this judgment the defendants appeal.

A demurrer to the petition of the township was filed by the defendants and was overruled. This ruling of the court is claimed to be erroneous. The petition consisted of two counts, one covering the period extending from the time Bailey was appointed to the office of trustee until his subsequent election thereto, and the other covering the term for which he was elected.

It is conceded that the first count, when considered alone, is sufficient; but it is insisted that the averments of the other count and certain facts disclosed by the evidence should have been considered in connection with such first count, in which case that count would be so modified that a demurrer would lie against it, and therefore the demurrer ought to have been sustained.

Of course this theory can not be sustained, as every count or cause of action in a pleading must, as against a demurrer, stand or fall upon its own averments. (*Butler v. Kaulback*, 8 Kan. 668; *L. N. & S. Rly. Co. v. Wilkins*, 45 Kan. 674; *Gilchrist v. Schmidling*, 12 Kan. 263.) Besides, a demurrer to the petition is heard and decided before any testimony is presented and when it would be impossible for the court to know what facts would be shown upon the trial. We think that the counts, when considered as the court must have considered them, are sufficient, and that it was right in overruling the demurrer.

The case as presented consisted of a long account of receipts and disbursements of cash and was peculiarly appropriate for the consideration and decision of a jury, and we are unable to see where any just criticism can be made to the verdict. If we were in any doubt as to whether or not the judgment of the district court should be affirmed, the action had upon the hearing of the motion for a new trial would remove that doubt. During this hearing the defendants were challenged to point out to the court wherein the verdict was excessive or erroneous, as alleged in the motion. This they declined and failed to do, and the court for this reason denied the application. This refusal on the part of the defendants' attorney was alone sufficient to justify the court in denying the motion for a new trial, and sufficient to constitute a waiver of any error which the court might have committed in the decision. It is the duty of every attorney engaged in the presentation of a cause to a court to assist in reaching a just conclusion, by stating fully and frankly to the court, when requested, all that he knows about the question under consideration. With such a statement the court might be able to grant the relief at once and save further delay and expense. A court has the right, upon such an application, to have the



---

Kamera v. Boiler Works.

---

errors complained of pointed out fully and clearly, and concealment or evasion of pertinent facts by the attorney is a violation of professional duty which will justify a refusal of the order requested. (*The State v. Everett*, 62 Kan. 275; *The State v. Balliet*, 63 Kan. 707, 710.)

We see no error, and the judgment of the district court is affirmed.

---

FRED KAMERA, *Appellee*, v. THE MISSOURI BOILER  
WORKS, *Appellant*.

No. 16,505.

SYLLABUS BY THE COURT.

**INSTRUCTIONS—***Duty of Master to Furnish Safe Place to Work—Immaterial Error.* In a case where strict accuracy of expression required an instruction that it is the duty of an employer to *exercise ordinary care* to furnish his employees with a reasonably safe place in which to work, the omission of the words italicized is not ground of a reversal where the jury were also told that the employer is liable only for such injuries to his employees as result from his negligence and that negligence is the failure to use ordinary care.

Appeal from Wyandotte court of common pleas;  
HUGH J. SMITH, judge. Opinion filed May 7, 1910. Affirmed.

*Dana, Cowherd & Ingraham*, and *McCabe Moore*, for the appellant.

*Enright & Screechfield*, and *Edward C. Little*, for the appellee.

The opinion of the court was delivered by

MASON, J.: The Missouri Boiler Works, a corporation, appeals from a judgment recovered against it by Fred Kamera on account of personal injuries received

---

Kamera v. Boiler Works.

---

while in its employ. He was hurt by the falling of a scaffold on which he stood while at work. The defendant maintains that there was nothing in the evidence tending to show that it knew of any defect in the scaffold or that it had any better opportunity than the plaintiff to acquire such knowledge. We conclude, however, there was justification for a finding that the original construction, which was the work of the defendant, was negligent, and that the resulting insecurity was not obvious to the plaintiff.

Another ground upon which a reversal is asked is that the court gave an instruction which included the statement that "it is the duty of an employer . . . to furnish his employees with a reasonably safe place in which to work." Doubtless this definition was inaccurate, for the courts are agreed that the employer is not an insurer of the safety of the place in which his employees work, but is only bound to use ordinary diligence to make it safe. Yet the rule has often been stated in substantially the form adopted by the trial court. In a note in 6 L. R. A., n. s., 602, in which the cases bearing upon every phase of the matter are fully collected and classified, it is said of this diversity of expression:

"An examination of the opinions of the courts on the subject . . . discloses that these different forms of statement of the rule are often used interchangeably and as meaning practically the same thing. The tendency to disregard or ignore the difference between these two forms frequently manifests itself in different cases decided by the same court. Sometimes a single case, even, will afford inherent evidence that the court regarded these different statements merely as different forms of the same rule, and did not regard the variation in phraseology as affecting the measure of the master's duty." (Page 603.)

That note (p. 605) cites many decisions reversing judgments on account of the instruction here complained of, and others (p. 608) refusing to do so be-

cause the rule was accurately stated elsewhere in the charge. In the case annotated (*Armour & Co. v. Russell*, 75 C. C. A. 416) that consideration was held ineffectual to cure the error, the court making an extreme application of the doctrine of presumed prejudice, saying:

"The presumption . . . is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced the complaining party, that the rule that error without prejudice is no ground for reversal is applicable." (Page 417.)

In the present case the jury were told in effect that a recovery depended upon the proof of negligence in the construction or maintenance of the scaffold, and that by negligence was meant a failure to exercise ordinary care. We can not believe they were misled as to the true measure of the defendant's responsibility. An instruction asked by the defendant contained the phrase "under the law defendant was only obligated to furnish plaintiff with a reasonably safe place to work." A new trial ought not to be granted merely because the instructions include an expression which, although not strictly accurate, has been repeatedly used by reviewing courts.

The judgment is affirmed.

JOHN AHERNE, *Appellee*, v. THE WAKEENEY LAND AND INVESTMENT COMPANY, *Appellant*, and W. H. CRAMER, *et al.*, *Appellees*.

No. 16,509.

SYLLABUS BY THE COURT.

1. PUBLICATION SERVICE—*Age of Affidavit When Order is Procured—Validity of Judgment.* An affidavit, such as is prescribed by chapter 326 of the Laws of 1905, was presented to the district court for the purpose of obtaining an order to serve defendants by publication. The court, after examination of the affidavit, found it in all respects in compliance with the law, and thereupon made the order. Notice by publication was given in accordance with such order, and at the proper time a decree to quiet title was entered against all the defendants, upon default. Thirty-seven days intervened between the date when the affidavit was sworn to and when the order was made. *Held*, that this lapse of time alone does not make the decree void.
2. JURISDICTION — *Waiver — Proceedings to Vacate Judgment.* Where a judgment has been entered in an action against defendants over whom the court did not have jurisdiction, and such defendants voluntarily request the court to open such judgment under section 77 of the code (Gen. Stat. 1901, § 4511) and permit them to plead in the action, which request is granted, and the pleadings are filed and the issues made thereby are litigated by such parties, all questions of jurisdiction are thereby waived and the parties are in court for all the purposes of the action.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Affirmed.

*Lee Monroe*, and *George A. Kline*, for the appellant.

*R. L. Holmes*, and *Charles G. Yankey*, for the appellees.

The opinion of the court was delivered by

GRAVES, J.: An action to quiet title was commenced in the district court of Kearny county, October 11, 1905, by John Aherne, who was in possession and

claimed title under a conveyance from F. C. Puckett, who held a tax deed to the land. James M. Mason owned the fee title. He had executed a promissory note for the sum of \$600 to A. C. Wilcox, and secured it by a trust deed to the premises, in which trust deed E. Heliker was named as trustee. The note was transferred by Wilcox to the WaKeeney Land and Investment Company. In the action to quiet title there were numerous defendants, and many tracts of real estate. Service upon all the defendants was made by publication notice, under the provisions of chapter 326 of the Laws of 1905. The plaintiff caused an affidavit to be prepared in accordance with the requirements of this statute; the affidavit was sworn to September 17, 1905, and the plaintiff presented it to the court October 24, 1905, and obtained an order of the court which reads:

"Now, on this 24th day of October, 1905, this cause comes on for hearing upon the application of the plaintiff for an order for service by publication herein and presents to the court his petition against the above-named defendants, and also presents to the court an affidavit of said plaintiff showing that each and every one of the above-named defendants are necessary parties defendant in the above-entitled action and that the unknown heirs and devisees and the unknown administrators, executors and trustees of all of said persons are necessary parties defendant in this action, which said affidavit sets forth the nature of the judgment which said plaintiff desires to have rendered against the said defendants and against the unknown heirs and devisees and the unknown administrators, executors and trustees of said defendants, and said affidavit also sets forth that the plaintiff has diligently endeavored to find the residence or place of abode of the said defendants, and each of them, and has endeavored to find whether or not the said defendants, or any of them, be alive. And also setting forth that said plaintiff has been unable to ascertain whether said defendants be alive, and the court, having inspected said affidavit, filed in the office of the clerk of the district court of this county in said action, finds and orders that the matters and things set forth in said affidavit

are true, and that the said affidavit is in due form and sets forth the facts required by statute.

"It is, therefore, by the court ordered that service by publication be made upon the said defendants and each of them, as though the said defendants and each of them were alive, and also in the alternative for service by publication upon the unknown heirs and devisees and the unknown administrators, executors and trustees of said defendants and each of them, and that said notice by publication be published in the *Lakin Investigator*, the same being a weekly newspaper printed and published in Kearny county, Kansas, and that the said notice shall be published not less than three consecutive weeks in such weekly newspaper, and that the date fixed for the answer of the defendants shall be not less than forty-one (41) days from the date of the first publication; said notice of publication to be in conformity to section 2, chapter 326, Session Laws of 1905.

"It is further ordered and adjudged that the said notice of publication on such unknown heirs and devisees and the unknown administrators, executors and trustees of the said defendants be published and embraced in the said publication as the notice of publication on the other defendants herein."

In the part of the affidavit which states the names of the defendants who were nonresidents of the state the names of A. C. Wilcox, and E. Heliker, trustee, were omitted. Publication was made as ordered by the court, the first publication being made October 27, 1905; the time for defendants to answer being on or before December 11, 1905. January 24, 1906, a decree was entered in favor of the plaintiff against all of the defendants, upon default. After the decree was entered the plaintiff sold the land to one M. L. Moore, who afterward conveyed it to W. H. Cramer. Both of these parties purchased in good faith, for a valuable consideration, and in reliance upon the decree.

On May 7, 1907, more than a year after the decree had been rendered, the WaKeeny Land and Investment Company, as the owner and holder of the note obtained from A. C. Wilcox, moved to have the decree opened and to be permitted to plead, under the provisions of

section 77 of the code (Gen. Stat. 1901, § 4511). It also moved that W. H. Cramer be made a party defendant. These motions were allowed, and both the investment company and Cramer appeared and filed answers. The investment company prayed for a judgment upon its note and a foreclosure of its trust deed. Cramer claimed to be a purchaser in good faith, relying upon the judgment in favor of his grantor, and prayed that he might be protected under the provisions of section 77 of the code as a purchaser in good faith. In this controversy the investment company insisted, and now insists, that the decree is void, for the reason that the affidavit upon which the order for publication notice was obtained is void because it was stale with age when used for that purpose. The affidavit was sworn to September 17, 1905. It, with the petition, was filed in the office of the clerk of the district court October 11, 1905. The order of the court directing publication to be made was obtained October 24, 1905. It is insisted that the statute contemplates that the order shall be made upon facts then shown to exist, and not upon facts shown to have existed thirty-seven days prior to the making of the application. Several decisions have been called to our attention which seem to hold that the date of the order, if not simultaneous with the date of the affidavit, must be as nearly so as the circumstances will permit. The statutes under which these decisions were rendered do not appear, however, to be the same as the law of this state.

The law of 1905 prescribes the facts which the affidavit shall contain, and requires the court to inspect the same carefully and cause the truth thereof to be established and its form to be such as the law prescribes. When the court, with all the facts before it, adjudicates that the affidavit, both in form and substance, is in full compliance with the law, it may make an order directing that the defendants be notified by publication, prescribing the time such notice shall be

---

Aherne v. Investment Co.

---

published, when the defendants shall answer, and that the notice contain such other facts as the statute requires. When a judgment has been rendered upon service obtained in pursuance to such careful precautionary steps it should not be lightly overthrown. The court had full jurisdiction to make the order requiring service by publication, and however irregularly that jurisdiction may have been exercised the order can not be held to be void.

The question has lost much of its importance, however, since the action of the investment company (which holds the promissory note of defendant Mason, assigned to it by A. C. Wilcox, whose name was omitted from the plaintiff's affidavit in naming the nonresident defendants) and of defendant W. H. Cramer (who claims to be a purchaser in good faith of the land in controversy under the decree). These parties caused the decree to be opened up under section 77 of the code, and obtained permission to plead in the case. The investment company filed an answer and cross-petition asking for judgment upon its promissory note and a foreclosure of the trust deed. W. H. Cramer claimed to have purchased the land in good faith and in reliance upon the decree obtained by the plaintiff, Aherne, and prayed that he be protected under the provisions of section 77 of the code. The investment company by its reply challenged the jurisdiction of the court and denied the good faith of Cramer. Under these issues the sufficiency of the plaintiff's affidavit was the chief question litigated. The court held the affidavit sufficient and refused any relief. From this judgment the investment company appeals to this court.

We are unable to see any material error in the action of the court. The affidavit may have been irregular, but it was not void. The appellant is not in a very good position to complain, however, for its voluntary application to be let into the case and its filing an answer and cross-petition asking for a foreclosure of its



---

McDougle v. Greenlees.

---

trust deed amounted to a complete waiver of any want of jurisdiction on the part of the court, either as to it or to W. H. Cramer, and the validity of the entire judgment is no longer assailable by the appellant.

This disposes of the case. The other questions discussed, and there are several of them, need not be considered. The judgment of the district court is affirmed.

---

MCDUGLE-CRAIG COMPANY, *Appellee*, v. J. R. GREENLEES, *Appellant*.

No. 16,510.

SYLLABUS BY THE COURT.

**JURISDICTION**—*Justices of the Peace in Douglas County*—"City Courts." The term "city courts" in the proviso of section 1 of the justices' civil code limiting the jurisdiction of justices of the peace in counties where city courts are established, does not include the county court of Douglas county, and the jurisdiction of justices in that county was not affected by that proviso.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed May 7, 1910. Affirmed.

*S. D. Bishop*, and *A. C. Mitchell*, for the appellant.  
*Fred A. Clarke*, and *W. B. Brownell*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: The question to be determined in this case is whether a justice of the peace in Grant township, Douglas county, had jurisdiction of an action for the recovery of money not exceeding \$300, where the defendant was a resident of the city of Lawrence. When the action was commenced and tried chapter 165 of the Laws of 1901, creating the Douglas county

court, was in effect. The defendant's contention is that the amendment of 1899 (Laws 1899, ch. 93, § 1; Gen. Stat. 1909, § 6361) to section 1 of the justices' code deprived the justice of jurisdiction. The amendment provides:

"That in any county in which a city court has been or shall be created, justices of the peace outside the city wherein such court is located shall not have jurisdiction of cases in which any defendant resides in such city."

It is argued that, as the provisions of the act creating the county court are similar to various acts creating city courts in several cities, the above proviso should be construed to include this court also.

The similarity of the acts creating various city courts and some of their points of difference are noted in *The State v. Nation*, 78 Kan. 394. The Douglas county court was given jurisdiction somewhat different from the city courts, although in its principal features not differing from that given to some of them. The rules of practice provided were taken from both the justices' and the civil codes, and some from neither. The clerk of the district court was *ex officio* its clerk, and the judge was elected by the voters of the entire county. Its title of county court was an apt designation, viewed in the light of its organization and jurisdiction. As the legislature referred only to city courts in limiting the jurisdiction of justices, and created both city and county courts, we can not presume that it intended to include the latter in the limitation. If the legislative purpose had been to include county courts in the limitation they would also have been named in the proviso.

The judgment is affirmed.

ORPHA BROWN, *Appellee*, v. THE HOME INSURANCE COMPANY OF NEW YORK, *Appellant*.

No. 16,511.

## SYLLABUS BY THE COURT.

1. **INSURANCE—Validity of Renewal Contract—New Policy Not Issued Nor Premium Paid at Time of Loss.** A parol contract to renew an existing contract of insurance, between those having authority to contract, by which the same property was to be insured again upon the same terms and conditions as in the original policy, is binding upon the parties although a policy for the new insurance was not issued nor the premium paid when the loss occurred, providing a credit is given and the payment of the premium is not a condition precedent to the validity of the contract.
2. ——— **Parol Renewal on Same Conditions as Original—Approval by Company.** A stipulation in a renewal contract that the property shall be insured on the same terms and conditions as in the former contract is interpreted to include the essential elements of a contract of indemnity, and does not refer to the steps or methods by which the original contract was reached or executed.
3. ——— **Authority of Agent—Approval of Contract by Principal.** The fact that the representative of the insurance company had no authority to consummate the original contract of insurance and that the approval of the home office was necessary to its validity is no reason why the renewal contract, made by the same agent, should be likewise approved, where it appears that such agent had in the meantime been clothed with authority to consummate contracts and to issue policies.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed May 7, 1910. Affirmed.

*F. M. Harris, and Fyke & Snider, for the appellant.*

*C. L. Randall, and S. T. Seaton, for the appellee.*

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action to recover on a preliminary parol contract of insurance. In 1904 the Home Insurance Company of New York issued a policy

---

Brown v. Insurance Co.

---

of insurance on a barn and other property belonging to Orpha Brown. In August, 1907, the insured, thinking that her policy was about to expire, applied to F. E. Fiehler, the agent of the company at Wellsville, for a renewal of the contract of insurance, and although the former contract did not expire for about four months the agent agreed to renew the insurance on the same conditions and for the same premium as in the former contract. On January 8, 1908, before a written policy had been executed and delivered, the barn was burned. Later Mrs. Brown tendered the agreed premium and also proof of the loss, but the insurance company denied the existence of a contract of insurance or that its agent had authority to make one. This action was then brought, and it resulted in a verdict for the full amount claimed by the plaintiff.

About the existence of the original contract of insurance there is no question, nor is there any dispute that negotiations were had between the agent of the company and Mrs. Brown for the renewal of the insurance. There is in fact no claim that a renewal contract, with an authorized agent of the company, in which the terms and conditions of the contract were agreed upon, would not be binding even although no premium had been paid or policy issued. The contention is that the appellee based her action upon an agreement that the terms and conditions of the new contract were to be the same as the old one, and that one of the conditions of the old contract was that it should not go into effect until it was approved by the home office in Chicago. It appears that when the first contract was made Fiehler was only a subagent, or soliciting agent, without authority to complete contracts or issue policies of insurance. Before the renewal contract was made he had been vested with the authority of a local agent and empowered to issue policies the same as other representatives of insurance companies, and upon request of the company a license had been issued to him by the state superintend-

ent of insurance. When the renewal contract was made no intimation was given to appellee that the approval of the home office of the company was required or that Fiehler was acting in any other capacity than as a general agent of the company.

The contention that one of the conditions of the renewal contract was the approval of the home office, because that step was necessary to the completion of the original one, is not sound. It is true that the terms and conditions of both contracts were to be alike, but approval by the home office was not written in the policy nor made a part of the first contract of indemnity. In the application for the original insurance there was a statement that the action of the agent was not binding on the company before the contract had been approved, but that was only a preliminary step toward the completion of a contract, made necessary because the company had then no one in Wellsville with authority to consummate a contract. The essential elements of the original contract imported into the renewal contract were that the identical property originally insured, in which there appears to have been no change, should be reinsured upon the same valuation, for the same time and for the same premium as in the original contract. The terms and conditions to which the parties referred related to indemnity, and not to the methods of reaching or executing the contract. The authority of the agent was no longer a matter of concern to anyone. When the renewal contract was made the company was represented by an agent clothed with apparent and real authority to make a complete and binding contract. He dealt with appellee as one having authority, and not as a mere soliciting agent, and appellee had the right to assume that he had the authority which he appeared to have. All of the essential elements of a contract were agreed upon. No restrictions of authority were mentioned, and there was no suggestion that a subsequent approval of the contract by anyone else would be necessary. No

---

Hutto v. Knowlton.

---

policy had been issued, it is true, but a binding contract of insurance may be made without the issuance of a policy. (*Insurance Co. v. Stone*, 61 Kan. 48; *Insurance Co. v. Corbett*, 69 Kan. 564.) It is for a breach of the parol contract and the resulting loss that the action was brought and damages awarded. The premium was not paid when the contract was made, but it appears that a credit was given; at least, a cash payment was not exacted. Probably the agent intended to collect the premium when the policy was delivered. The acceptance of a promise to pay or an arrangement to allow the premium to stand as a charge against appellee is enough to complete the contract, and it was therefore as binding upon the parties as if payment had in fact been made. (*King v. Cox*, 68 Ark. 204; *Baldwin v. Phœnix Ins. Co.* [Ky.], 54 S. W. 13; *Richards Ins.*, 3d ed., pp. 205, 281.)

No error being found, the judgment of the district court is affirmed.

---

DAISY HUTTO, *Appellee*, v. EMILY IRENE KNOWLTON,  
*Appellant*, and A. W. ELLIS *et al.*, *Appellees*.

No. 16,514.

SYLLABUS BY THE COURT.

**LIMITATION OF ACTIONS—Fraud—Notice—Public Records.** The rule that, if an examination of the public records would reveal a fraud, the records themselves furnish sufficient constructive notice of the fraud to set the statute of limitations in motion does not obtain in favor of a vendee of real estate who procured his conveyance by means of false and fraudulent representations respecting the state of the record, upon which the vendor innocently relied.

Appeal from Pratt district court; PRESTON B. GILLET, judge. Opinion filed May 7, 1910. Reversed.

---

Hutto v. Knowlton.

---

*George L. Hay*, for the appellant.

*William Barrett*, and *R. F. Crick*, for the appellees.

The opinion of the court was delivered by

BURCH, J.: The appellant, a resident of the state of Illinois, was made a defendant in an action to quiet title, and answered praying that a conveyance she had made of the land in controversy be set aside because induced by false and fraudulent representations. A demurrer was sustained to the answer, which stated a cause of action unless relief were barred by the statute of limitations. The portions of the answer now material read as follow:

"That during the month of January, 1903, the said A. W. Ellis, for the purpose of deceiving and defrauding this defendant, represented to this defendant that a tax deed had been issued upon the above-described land, and that he, the said A. W. Ellis, was acting for and representing the said tax deed holder; that the said tax deed holder had been in the possession of said lands under said tax deed for more than five years, and that said tax deed and the possession of said lands under said tax deed for a period of five years and more gave to such tax deed holder a good and incontestable title to said lands, and that by reason thereof this defendant was fully, completely and forever barred from any and all interest that she may have had or claimed in and to said lands; that said tax deed holder to said lands desired to perfect his 'chain of title' to said lands by procuring a quitclaim deed from this defendant, and that if this defendant would execute a quitclaim deed he would pay her the sum of \$25, but that if she failed and refused to give such quitclaim deed said tax deed holder could easily and would positively institute legal proceedings against this defendant and thereby perfect his title; that the said A. W. Ellis, in furtherance of said plan, scheme and conspiracy of said A. W. Ellis and A. S. Fay to deceive and defraud this defendant, sent this answering defendant a deed for said lands, already prepared for execution, to be signed by this defendant, conveying her interest in and to said lands to one O. H. Bock, of Pratt, Kan., and directed her to execute said deed and then at once forward said deed

---

Hutto v. Knowlton.

---

after execution to the National Bank of Pratt, Kansas, for delivery, and thereby did represent to this defendant that the said O. H. Bock was the holder of said tax deed; . . . that the said O. H. Bock had no interest in said transaction, and no interest in said lands, and no interest in the money that was remitted to this defendant for said quitclaim deed, more than to receive the record title to said lands under and by virtue of said quitclaim deed for the convenience and accommodation of the said A. W. Ellis and A. S. Fay.

"This defendant further alleges that the said O. H. Bock, on or about the 11th day of February, 1903, and since the execution and delivery of said quitclaim deed as aforesaid, transferred and conveyed without consideration all his interest in and to said lands to the said A. W. Ellis, and the said A. W. Ellis now holds the record title to said lands. . . . This defendant further alleges that in truth and in fact the said O. H. Bock is not now and never has been the holder of a tax deed upon said lands or any part thereof; that the said A. W. Ellis was not then and is not now and never has been representing or acting for said O. H. Bock with reference to any tax deed which may have been issued upon said lands; that the said A. W. Ellis is not now and never has been representing or acting for any tax deed holder upon said lands or any part thereof; that no tax deed holder was intending to institute legal proceedings against this defendant based upon a tax deed, and that no tax deed had been issued upon said lands that was incontestable, and that there was no tax deed upon said lands that fully, completely and forever barred this defendant from her interest in said lands, and that the said A. W. Ellis knew at the time the aforesaid statements and representations were made and the aforesaid acts were done and performed that he was not acting in any capacity whatever for any tax deed holder upon said lands, and that no tax deed holder was intending to institute legal proceedings against this defendant based upon a tax deed, and that said tax deed or any tax deed on said lands was not incontestable, and that the same did not fully, completely and forever bar this defendant from any or all interest in and to said lands."

The answer was filed in November, 1906, within two years after the actual discovery of the fraud, but al-



most four years after it was committed. The contention is that the public record afforded constructive notice of the fraud sufficient to start the statute, under the authority of *Black v. Black*, 64 Kan. 689. The second paragraph of the syllabus of that case enunciates the following principle of law:

“Where the means of discovery lie in public records required by law to be kept, which involve the very transaction in hand, and the interests of the parties to the litigation, the public records themselves are sufficient constructive notice of the fraud to set the statute in motion.”

This doctrine has been approved and applied in the cases of *Lewis v. Duncan*, 66 Kan. 306, *Donaldson v. Jacobitz*, 67 Kan. 244, and *Rogers v. Richards*, 67 Kan. 706.

In *Black v. Black* the fraud imputed related to the management, settlement and distribution of the estate of a deceased person. The party charged was the administratrix. The law required her to make manifest her conduct by reports and accounts, which were published upon the probate court records for the express purpose of affording information to parties interested. She made this record, concealing nothing and making no independent representations, and the court held it gave constructive notice to everybody concerned of what was done. The rule itself was admirably expressed, but the foundation of it was not so definitely stated, and may be said to consist in this: Where a public record is required by law to be kept as a source of information respecting property rights and interests a duty rests upon anyone to whom the information is material to improve with diligence the opportunity of learning that which the record discloses. It follows that if the opportunity be neglected the interested person will be bound to the same extent as if he had in fact examined the record. But the rule is no broader than its basis, and if for any reason no obligation ex-

ists to consult the record, or if the interested person be circumvented from taking advantage of his opportunity, the rule does not obtain.

There is no obligation resting upon a landlord to watch the records for tax deeds fraudulently taken out by his tenant. (*Duffitt v. Tuhan*, 28 Kan. 292; *St. Clair v. Craig*, 77 Kan. 394.) Where fiduciary relations exist requiring the disclosure of the true state of facts there is no reason to anticipate unfaithfulness, and the obligation to search the records is relaxed. (*Hinze v. Hinze*, 76 Kan. 169; and see *Donaldson v. Jacobitz*, 67 Kan. 244.) Likewise, if a party be prevented by fraud from availing himself of the benefit of the record, or be led by such means to forego an investigation of the record, no one participating in the fraud can insist upon the enforcement of the duty to do so. We have here just such a case. The records were not accessible to the appellant, who lived in a distant state. Ellis undertook to impart the very information which, if his statements were true, the records would have furnished. The appellant had no reason to question his veracity, and the law did not oblige her to do so. She had the right to accept his representations as true, and to rely upon them as faithful disclosures of what she would discover from the records if she consulted them. (*Matlack v. Shaffer*, 51 Kan. 208; *Carpenter v. Wright*, 52 Kan. 221.) Since he presumed to report to her the state of the record at the time she made her deed, she was not then required to go to the record itself. After she parted with title she could have no occasion to consult the record. Therefore the merely constructive notice which it imparted was not sufficient, and the statute did not begin to run until the fraud was otherwise discovered.

The judgment of the district court is reversed and the cause is remanded, with direction to overrule the demurrer to the answer.

---

The State v. Johnson.

---

THE STATE OF KANSAS, *Appellant*, v. H. B. JOHNSON  
*et al.*, *Appellees*.

No. 16,517.

## SYLLABUS BY THE COURT.

**APPEARANCE BOND—Forfeiture—Appearance by Attorney—Discretion.** In a criminal case pending before a justice of the peace on a charge of misdemeanor, where a continuance has been granted and the defendant has been released upon a bond given to secure his attendance at a certain day and hour, at which time the case is set for trial, it is within the discretion of the court, if the defendant appear only by attorney at the time and place specified for trial, to proceed with the trial or to refuse to proceed and to forfeit the bond.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed May 7, 1910. Reversed.

*Fred S. Jackson*, attorney-general, and *W. B. Pleasant*, county attorney, for the appellant.

*F. A. Waddle*, for the appellees.

The opinion of the court was delivered by

SMITH, J.: This action was brought in the district court of Franklin county, by the county attorney, in the name of the state. The petition alleged all the facts stated in the agreed statement of facts hereinafter set forth, and had attached thereto as an exhibit the bond, of which the following, omitting the caption and certificate of approval, is a copy:

“State of Kansas, Franklin County, ss:

“Whereas, upon good cause shown, the trial of the above-entitled cause is this 7th day of December, 1908, postponed unto the 15th day of December, 1908, at nine o'clock A. M., at the office of the above-named justice in said township:

“Now, we, the undersigned, residents of said county, bind ourselves to the state of Kansas, in the sum of two hundred dollars, that said defendant, L. N. Burlingame, will appear before said justice at the time and

---

The State v. Johnson.

---

place appointed for said trial, then and there to answer the complaint in said cause alleged against him.

H. B. JOHNSON,  
O. E. DICK."

The answer of the appellees was (1) a general denial, and (2) that at the time and place appointed for the trial Burlingame appeared by counsel and demanded a trial, but that the county attorney objected and refused to proceed with the trial at that time.

A trial of the issues joined was had before the court, without a jury. A transcript of the docket of the justice of the peace before whom the criminal action had been pending was introduced in evidence, and it showed that before the continuance the justice had declared the bond forfeited, and, generally, the facts stated in the following stipulation made by the parties:

"It is agreed by and between the parties to this action that on the 7th day of December, 1908, a criminal action was commenced by the state of Kansas against one L. N. Burlingame, before J. W. Spangler, who was then and at all times hereinafter mentioned a duly elected, qualified and acting justice of the peace of Pomona township, Franklin county, Kansas; that said action was entitled, 'The State of Kansas, Plaintiff, v. L. N. Burlingame, Defendant,' and that at the commencement thereof the said county attorney filed in said justice court of said Spangler, and with said Spangler, a complaint in writing in six counts, in each of which counts it was alleged, in substance, that said Burlingame, at a date mentioned therein, in the year 1908, did, within the county of Franklin and the state of Kansas, willfully and unlawfully barter and sell spirituous, malt, and other intoxicating liquors without taking out or having any permit to sell intoxicating liquors as provided by law; that said complaint was duly sworn to by said county attorney, and at the request of said county attorney said justice of the peace thereupon issued his warrant in writing to the sheriff of said county for the arrest of said defendant, Burlingame, and thereupon the said sheriff on said

---

The State v. Johnson.

---

day at once duly served said warrant by arresting said Burlingame and bringing him before said justice of the peace, and then made his return upon said warrant and filed the same with said justice, and then and there in fact had said Burlingame in actual custody and in said court before said justice, on said December 7, 1908; that thereupon, for good cause shown, the trial of said cause was adjourned and postponed by said justice until 9 o'clock A. M., on December 15, 1908, and it was then and there, on December 7, ordered and adjudged by the said court that said Burlingame should furnish his recognizance in the sum of \$200 that said Burlingame would appear before said court at said time and place appointed for said trial, then and there to answer the complaint filed against him, and in default thereof he be committed to the jail of Franklin county. Whereupon, and immediately upon the making of said order, and while said Burlingame was in the actual custody of, and held by, said sheriff, the defendants executed the bond sued upon in this action for the appearance of said Burlingame at the time and place set for said trial, and said bond was furnished on behalf of said Burlingame and approved and filed as alleged in the petition, and was executed to procure the release of said Burlingame from said sheriff; that upon the filing of said bond, and upon account of the execution of it, said Burlingame was then and there duly released from said custody; that at the time to which said trial was adjourned, to wit, on December 15, 1908, at 9 o'clock A. M., the state of Kansas appeared by said county attorney, with at least ten witnesses, ready to try said cause; that the said Burlingame appeared not, and did not attend said court or come in or to said court, or before said justice, or to the office of said justice, and could not be found; that the hour of 9 o'clock having fully arrived, said case was called for trial, and immediately thereafter said Burlingame was called by the sheriff, by order of said court, three times audibly at the front door of the office of said justice, and each of said bondsmen was called by the sheriff at said door and called to bring into court said Burlingame and save their recognizance; but said Burlingame did not come and was not brought into court, and did not appear before said justice or in his court on said day, and has never since

---

The State v. Johnson.

---

appeared before him, but willfully absented himself from said court; that at the time and place set for said trial, to wit, at 9 o'clock A. M. on said December 15, F. A. Waddle, a regularly practicing attorney of said county, employed by said defendant, appeared in said court as attorney for said Burlingame, and requested that a trial of said cause be had in the absence of said Burlingame, to which the county attorney objected, which objection was sustained by the court, and the cause was then continued till December 29, 1908, at 9 o'clock A. M."

The district court gave judgment for the appellees, and the plaintiff appeals.

It will be observed that six charges were made in the complaint before the justice of the peace of separate violations of the prohibitory liquor law, and that if Burlingame had been convicted on any of the charges it would have been the duty of the justice of the peace to impose a fine of not less than \$100 and a sentence of at least thirty days' imprisonment in the county jail for each offense. The bond called for the appearance of the accused at nine o'clock A. M., December 15, 1908, at the office of the justice of the peace in the township. The petition alleged that on the day prior to such 15th day of December the accused had fled from the county and never thereafter appeared. This allegation does not appear to have been agreed to in the agreed statement, nor to have been proved. The case was called at the time and place set for the appearance of the accused, and neither he nor his bondsmen appeared in person, but he appeared by attorney and demanded a trial, and the court, on the objection of the county attorney, refused to proceed and continued the case; and thereafter a third continuance was had, and the case was finally dismissed, neither the accused nor his attorney having appeared otherwise than as stated.

The sole question presented is whether in such a case the justice of the peace is bound to accept the appearance of the accused by attorney and proceed with

the trial in the absence of the accused, and the question is to be determined by the construction of sections 207 and 245 of the criminal code and section 20 of the justices' criminal code, which read:

Sec. 207. "No person indicted or informed against for a felony can be tried unless he be personally present during the trial; nor can any person indicted or informed against for any other offense be tried unless he be present, either personally or by his counsel." (Gen. Stat. 1901, § 5649.)

Sec. 245. "For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to pay the judgment and costs; judgment may then be rendered in his absence." (Gen. Stat. 1901, § 5690.)

Sec. 20. "All proceedings, including the mode of procuring and the grounds for a change of venue, upon the trial of misdemeanors before a justice of the peace, shall be governed by the provisions of the code of criminal procedure so far as the same are in their nature applicable, and in respect to which no provision is made by statute." (Gen. Stat. 1901, § 5825.)

On the part of the appellees it is contended that the appearance of the accused by his attorney, who requested that the trial proceed, was a complete satisfaction of the conditions of the bond. The converse of the proposition is insisted upon by the state; and it is contended that at most it is a matter within the discretion of the justice of the peace to proceed with the trial or not, and that in a case like the one in point, where imprisonment in case of conviction is a necessary part of the judgment, the discretion should be exercised as it was in this case.

In *Kenworthy v. El Dorado*, 7 Kan. App. 648, it was held, in a case pending before the police judge of the city, that it was error to take the forfeiture of the recognizance when the defendant appeared by attorney and demanded a trial; but that appears to have been a

---

The State v. Johnson.

---

case in which only a fine could be imposed as a penalty in case of conviction. That case, at any rate, does not decide the interpretation of the sections copied above. Construing sections 207 and 245, it simply held that the presence of the defendant at the time forfeiture of the bond was taken was not necessary.

It does not appear that there is any provision in the procedure before justices of the peace in misdemeanors bearing upon the question of the presence of the defendant at the time of the trial, and for the purposes of this case we shall assume that section 207 applies to such a case. Construing, then, section 207 with section 245, the question to be determined is whether a justice's court, on the trial of a case which if it result in a conviction involves the immediate imposition of a jail sentence upon the defendant, is compelled by these statutes to proceed with the trial in the absence of the defendant, when he appears only by attorney and demands a trial. In *The State v. Baxter*, 41 Kan. 516, where the trial in the district court was for assault and battery, it was held that the "personal presence of the defendant during a trial for a misdemeanor is not absolutely required." (Syllabus.) In *The State v. Ellvin*, 51 Kan. 784, it was said:

"Where the defendant, near the close of his trial for a misdemeanor, renders himself unable to attend the trial by the voluntary use of intoxicating liquors, and an application is made for a continuance of the trial upon that ground, a denial of the same will not be held to be fatal unless there is a clear abuse of discretion; and *held*, that, under the circumstances of this case, there was no abuse of discretion." (Syllabus.)

That was a trial for a violation of the prohibitory liquor law, and the presence of the defendant was treated as a matter in the discretion of the trial court. While the statutes prohibit the trial of a person on the charge of felony in his absence, and inferentially permit the trial of a defendant on a charge of misdemeanor in his absence, neither provision expressly con-



fers upon the defendant the right to be present at a trial or the privilege of being absent therefrom. Inferentially section 207, which prohibits his trial for a felony in his absence, implies a right to be present, and inferentially, it may be said, this section implies his right on a trial for any other offense to be absent if he appear by attorney; but, as we have seen (*The State v. Ellvin*, supra), the court may in its discretion proceed with the trial in his absence. For the purposes of judgment, under section 245, if the conviction be for an offense punishable by imprisonment, he must be personally present; if by a fine only, judgment may be rendered in his absence, if some responsible person undertake for him to pay the judgment and costs. Since the statute in no case explicitly confers the right of the defendant to be absent on his trial for a misdemeanor, and expressly requires his presence when judgment is rendered therein, if the judgment be for imprisonment, as it must have been in the case out of which the present proceeding arose, if a conviction had been had, we are inclined to view the matter of the right of the accused to a hearing in his absence as within the discretion of the court.

These statutes are to be construed with reference to the purpose sought to be accomplished, and in view of the history of criminal litigation. The statutes of our state above copied substantially conform to the rule at common law, and may almost be regarded as a reenactment of the common law. At common law, for lesser misdemeanors, punishable only with a fine, the presence of the defendant at the trial was not essential, but for misdemeanors punishable with imprisonment it was essential. A pertinent discussion of the question involved is found in *Warren v. The State*, 19 Ark. 214. The following is an excerpt from the opinion therein:

“The counsel for the appellant maintains that, under these provisions of our code, as well as by the terms of

---

The State v. Johnson.

---

the common law, Emerson, the defendant in the indictment, had a right to appear by his counsel, plead to the indictment, and thus discharge his recognizance; and we are cited to several Vermont and English decisions in support of this position.

"We have examined the cases to which we have been referred by counsel, and find that they only go to the extent that a verdict may be rendered, and a judgment pronounced, against a defendant, upon a charge of a slight misdemeanor, without his being personally in court at the time; and this is the purport of the statute, as held in the case of *Sweeden v. The State*, ante, p. 205. We presume our statutory provision was intended to be, what it really is, declaratory of what the law was before its passage; or, in other words, it is a legislative interpretation of the law as it stood at the time. Taking our statute as being declaratory of what the law was, we feel no hesitancy in saying, independent of other considerations, that it is purely a matter of discretion with the court before which a criminal prosecution for a misdemeanor is depending whether the defendant shall or shall not be permitted to answer to the indictment by attorney or agent, without personally appearing in court himself, to be exercised or not according to the circumstances in each particular case; and, it being a matter of sound discretion in the court, can not be controlled or reviewed by this court on error or appeal. But suppose, for the argument, that Warren had been permitted to appear for Emerson, and answer to the indictment, would that fact satisfy the condition of the recognizance in this case? We think most clearly not, and we are sustained in this conclusion by the very authorities to which we have been referred by the counsel for the appellant." (Page 217.)

We conclude that in misdemeanor cases in this state, where the defendant is under bond to appear and answer the charge at a certain day and hour, it is within the discretion of the court, if the defendant appears by counsel and requests a trial, to proceed with such trial; that if the offense is one for which imprisonment is to be inflicted in case of conviction, the discretion should ordinarily be exercised by refusing to pro-

---

Watt v. Railway Co.

---

ceed with the trial. In any event, in such a case, the defendant must be present at the time sentence is pronounced. If the court be satisfied that the nature of the offense is such that in case of conviction imprisonment will not be inflicted as a penalty, the court may in its discretion try the case in the absence of the defendant, and, if some responsible person appears and undertakes for the defendant to pay the judgment and costs, the judgment also may be rendered in his absence.

It appears in this case that the court exercised its discretion properly and refused to proceed with the trial; and, the facts all appearing by agreement and the record of the court, and it appearing therefrom that the case was one in which imprisonment must have been inflicted as a part of the penalty in case of conviction, the judgment is reversed and the case is remanded, with instructions to render judgment upon the forfeited bond as prayed for.

---

D. M. WATT, *Appellee*, v. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant*.

No. 16,518.

SYLLABUS BY THE COURT.

1. RAILROADS—*Injury to Stock—Shipment under Written Contract or the Common Law—Question of Fact.* In an action by a shipper against a railroad company to recover damages for injuries to stock alleged to have been caused by delay in transportation, where the principal question in dispute was whether the shipment was made under a written contract, as the defendant claimed, or under the common law, as the plaintiff claimed, and the evidence was conflicting, it was error for the court to hold as a matter of law that the contract was not binding on the plaintiff.
2. CONTRACTS—*Execution by Agent—Evidence of Ratification.* Upon the evidence in this case it was error to deny a request

---

Watt v. Railway Co.

---

for an instruction to the effect that if the plaintiff used the contract under which the defendant claimed the stock was shipped in order to secure a return pass from the point of destination, and thereby obtained from the defendant something of value which he would not otherwise have obtained, he must be held to have ratified the execution and signing of the contract, although he may not have expressly authorized anyone to sign it for him.

3. EVIDENCE—*Admissions—Abandoned Pleading.* While an abandoned pleading no longer serves to define the issues, it has some evidentiary force in the nature of an admission on the part of the pleader, and should be received in evidence for what it is worth.

Appeal from Bourbon district court; JOHN C. CANNON, judge. Opinion filed May 7, 1910. Reversed.

*John Madden*, and *W. W. Brown*, for the appellant.

*John H. Crain*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff sued to recover for injuries to a carload of horses shipped from Fort Scott, Kan., to Fort Worth, Tex. The petition alleged that the shipment was under a written contract, a copy of which was attached thereto. The horses were shipped on the afternoon of September 14, 1906, and it is claimed that they should have arrived at Fort Worth in about thirty-six hours, which would have been Sunday morning; that, in fact, they arrived Monday morning; that they were *en route* about twenty-seven hours longer than they should have been; that the car was left standing at different places on the road for several hours, and was switched around to such an extent that the horses were crowded and several of them were injured.

The court sustained a demurrer to the petition, presumably on the ground that there was no allegation that the plaintiff had given written notice of the injuries, as provided in the written contract. The plaintiff then filed an amended petition, setting up a common-law

shipment and alleging that the averment in the former petition to the effect that the horses were shipped under a written contract was a mistake of fact, made by his attorney, and that there was no contract in writing. The answer was a general denial, and an averment that the shipment was made under a written contract, a copy of which was attached to the answer as "Exhibit A," which is identical with the contract set out in the first petition. The answer then alleged as a defense the failure of the plaintiff to give written notice of the claim, and also that the plaintiff by the terms of the contract released the value of the horses to \$100 per head. There was a further defense that in accordance with the United States statutes the defendant was compelled to unload the horses for water, feed and rest, which it did. The reply was a verified denial of the written execution of the contract or that the same was signed by anyone having authority from the plaintiff to sign his name.

On the trial the evidence showed that D. M. Watt, the plaintiff, had bought and shipped horses and mules for several years; that in 1906 he made from twenty-five to thirty shipments to Texas; that he ordered the car for the horses in question through an employee of the horse-and-mule market at Fort Scott. This employee gave the order to the station agent of the defendant by telephone. The company set the car out at the place requested, and it was loaded and the shipment made.

The plaintiff testified that he usually made his shipments under contracts similar to "Exhibit A"; that he went to the railway station on the day of the shipment in question for the purpose of signing a contract; that he found no one at the station and came away without seeing the agent. He did not go with the horses, but took a passenger train to Fort Worth. After the horses were shipped, and on the same day, he sent one McLaughlin, an employee of the horse-and-mule market, to the station agent to procure the contract and mail it

to him at Fort Worth, so that he might get a return pass. The evidence is that when McLaughlin asked the agent for the contract the agent requested him to sign the same, and to sign it P. M. Watt instead of D. M. Watt, because that was the name of the shipper as the agent understood it over the telephone. McLaughlin signed it P. M. Watt and received a duplicate copy, which he sent to the plaintiff at Fort Worth. Across the face of it appeared in red ink the words, "contract signed by Edd McLaughlin." At Fort Worth the plaintiff took the duplicate sent to him to the live-stock agent of the company, and by means of it received transportation from Fort Worth to Fort Scott, which he used.

The defendant offered in evidence the plaintiff's first petition, with "Exhibit A" thereto attached. The court sustained an objection to this on the ground that there was no evidence to show that the plaintiff had ever had anything to do with the contract or was bound by it in any way. This was manifestly error. While the abandoned pleading no longer served to define the issues, it was some evidence, in the nature of an admission, on the part of the plaintiff, and should have been received for what it was worth. (*Reemsnyder v. Reemsnyder*, 75 Kan. 565, 570; 1 Encyc. Pl. & Pr. 625, 626; 16 Cyc. 971, 972.)

The defendant also offered in evidence a copy of the order of the railroad commissioners permitting railroads to limit their common-law liability on shipments of freight. The copy was properly certified by the secretary of the board. An objection to this was sustained. In the same connection the defendant offered to prove by the agent at Fort Scott that he was in possession of the tariffs which governed the rates of stock shipments at the time the horses were shipped, and that there were two rates in force over the defendant's line—one for shipments made under a contract like "Exhibit A," and another twenty per cent higher under the common law;

that these tariffs had been duly filed with the interstate commerce commission, and duly published in accordance with the laws of the United States. To this evidence an objection was also sustained. The court appears to have held as a matter of law that there had been no proof offered by the defendant showing the execution of a written contract binding upon the plaintiff. Apparently for the same reason, the court denied a request for an instruction asked by the defendant to the effect that if the plaintiff used the contract known as "Exhibit A" after the shipment was made, in order to secure a return pass from Fort Worth, and thereby obtained from the defendant something of value which he would not otherwise have obtained, he must be held to have ratified the execution and the signing of the contract, although he may not have expressly authorized anyone to sign it for him.

We think the court erred in sustaining the objection to the evidence and in refusing the instruction. Whether the written contract under which the defendant claimed the horses were shipped was the contract of the plaintiff was a disputed question of fact. The issue was squarely raised by the pleadings. The plaintiff does not appear to have produced any evidence at the trial that his attorney was mistaken in the facts at the time the first petition was drawn. On the contrary, there is evidence that before the petition setting up the written contract was filed the plaintiff and his attorney secured copies of the contract from the agent of the defendant at Fort Scott. The abandoned pleading, as we have seen, contained some evidence tending to show a written contract binding on the plaintiff. In addition to this, there was evidence which tended to show that the plaintiff had ratified the act of his agent in signing the contract. There is no question that it was the intention of the plaintiff to execute a contract with the form and character of which he was familiar, and that he was only prevented from doing so by being unable

---

Watt v. Railway Co.

---

to find the station agent. He authorized another person to get the contract for him knowing that in order to do so it must be signed, and afterward used it knowing all the facts with respect to its execution, its terms and conditions, and by means of it received a return pass, which he could not have obtained except for the contract. These facts were all in evidence, and from them a jury would have been justified in finding that he ratified what his agent did and was as much bound by it as if he had signed the contract himself. (*Ehrsam v. Mahan*, 52 Kan. 245; *McKinstry v. Citizens' Bank*, 57 Kan. 279; *Aultman v. Knoll*, 71 Kan. 109.) It was said in the syllabus of *McKinstry v. Citizens' Bank*, *supra*:

"One who accepts the benefits of a contract, made without authority in his behalf, after being fully informed of all its terms, must also accept the burdens imposed on him by the contract."

The court should have admitted in evidence the original contract, as well as the abandoned pleading and the other evidence offered for the purpose of showing that the plaintiff, with full knowledge of the terms and conditions of the contract, had ratified it by accepting the benefits which it conferred. The court could not say as a matter of law that there was no evidence showing that a contract in writing was executed which was binding upon the plaintiff. For the same reason the evidence offered by the defendant for the purpose of showing authority from the board of railroad commissioners permitting the defendant to limit its common-law liability on shipments of freight, and the fact that there were two tariffs in existence covering shipments of the kind in question, should have been admitted. The instruction asked correctly stated the law as to the ratification of the unauthorized acts of an agent, and should have been given. (*Aultman v. Knoll*, 71 Kan. 109, and cases cited.)

There is a further complaint because the court re-



---

Blair v. Blair.

---

fused to submit to the jury the following special questions:

"(1) Did plaintiff, or some one for him, sign and deliver to the defendant company a written contract covering the shipment?

"(2) Did the plaintiff, or some one for him, execute the written contract offered in evidence as 'Exhibit A'?

"(3) Did not plaintiff take 'Exhibit A' at Fort Worth and obtain thereby a pass from Fort Worth to Fort Scott for himself?

"(4) Did the plaintiff, by the use of 'Exhibit A' at Fort Worth, Tex., obtain from the defendant the service of passing him back to destination free of charge?"

The questions related to facts which were directly in issue, and the defendant was entitled to have the finding of the jury thereon.

Other questions are argued in the brief which are not deemed necessary at this time to pass upon, for the reason that on another trial they may not be raised. For the reasons stated the judgment is reversed and the cause remanded for another trial.

---

BARBARA A. BLAIR, *Appellee*, v. WILLIAM A. BLAIR  
*et al.*, *Appellants*, and EDWARD G. BLAIR *et al.*, *Appellees*.

No. 16,519.

SYLLABUS BY THE COURT.

1. **WILLS—Construction.** In construing a will the meaning of the words used will be expanded or restricted so as best to express the purpose and intent of the testator.
2. **WORDS AND PHRASES—"Support and Maintenance."** Where a testator having ample means makes a liberal provision for the "support and maintenance" of his widow, those words will be given a broad and liberal significance when no language is used in connection therewith which tends to restrict or limit their meaning.
3. **WILLS—Provision for Widow—Diversion of the Fund.** The

---

Blair v. Blair.

---

provision made by a testator for the support and maintenance of his widow can not be used or diverted to uses or purposes wholly foreign to her maintenance or personal expenses.

4. WORDS AND PHRASES—"Required." Where it is provided in the will that the widow may draw from the estate all the money required for her support and maintenance the word "required" will not be interpreted to mean an amount needed or necessary for such purpose, but it will be held to include such sum or sums as she may request or wish to use for such purpose.

Appeal from Atchison district court; BENJAMIN F. HUDSON, judge. Opinion filed May 7, 1910. Reversed.

*James W. Orr, W. P. Waggener, and J. M. Challiss,*  
for the appellants.

*C. D. Walker, Henry D. Ashley, William S. Gilbert,*  
and *Denton Dunn*, for the appellees.

The opinion of the court was delivered by

GRAVES, J.: This is an action to obtain the construction of a will. Edward K. Blair, a citizen and resident of Atchison, died April 7, 1898, in that city, leaving an estate which largely exceeded in value \$100,000. His surviving heirs at law consisted of his widow, Barbara A. Blair, and five children, William A. Blair, John W. Blair, Edward G. Blair, Elwin B. Blair, and Fanny Blair Hackney. He died testate, and his will was duly probated in Atchison county June 29, 1898. William A. Blair, Harry H. Hackney and John W. Blair, having been named by the testator as his executors, were duly appointed, and they legally qualified and entered upon the discharge of their duties as such. Harry H. Hackney is the husband of Fanny Blair Hackney, the testator's daughter. The heirs at law now disagree as to the meaning of the will, and have brought this action to obtain a construction thereof. The portion of the will which they desire construed reads:

"Second. I give, devise and bequeath to my beloved

wife, Barbara A. Blair, should she survive me, all my property and estate, real, personal and mixed, to have and to hold the same during her natural life, subject to the provisions hereinafter contained.

"Third. It is my will that at my death, my executors, hereinafter named, shall immediately take possession, charge and control of my property and estate above mentioned, and of my business, and hold and keep my said estate, property and effects intact, and continue the milling business and all my business as it is now carried on and conducted, collecting rents, making necessary repairs, loaning money, and managing and conducting the same in all respects as I, myself, have conducted the same; my object being that all my estate and property shall be kept together and intact and all my business be continued as it now is until such time as hereinafter provided.

"Fourth. It is my will and I direct that my said executors, out of the net proceeds of my business and earnings of my estate and property, pay over to my said wife, from time to time, for her *support and maintenance*, such amounts thereof and at such times as she may desire and request, and if such earnings exceed the amount *required* by my wife for her maintenance, and accumulate in the hands of my said executors, it is my will that they reinvest the same, as fast as they so accumulate, as part of my estate, and that the same be divided among my children as the balance of my estate."

There are no other clauses in the will which modify these provisions or can be useful in determining their meaning. The contention between the parties seems to be concerning the rights of the widow under the will, she claiming that she is entitled to receive upon request, if she so desires, the whole of the income of the estate, to use as she may desire without restraint from the executors, while the executors contend that they are limited in their disbursements to her to such amount as may be reasonably necessary for her maintenance and support, or, otherwise expressed, what may be required for her living expenses.

The intent of the testator upon this subject does not

---

Blair v. Blair.

---

seem obscure or difficult to ascertain. The words "support and maintenance," used in the fourth clause of the will, are not to be understood in a narrow or limited sense, but were used in their broad and liberal meaning, to indicate the general scope and purpose for which the provision was made rather than to point out or limit its amount. This intent is further indicated by the subsequent clause, which reads: "If such earnings exceed the amount required by my wife for her maintenance," etc. This seems to convey the idea that the testator thought the probability that she would require all the income to furnish her with such maintenance as he intended her to have sufficiently strong to warrant a special suggestion that, in case she did not require that amount, then the executors should use the excess for another purpose.

It seems evident that the testator had a decided purpose to provide his widow with means sufficient to enable her to live in such comfort, elegance and style as was befitting a widow who had resources equal to the income of his estate to use for that purpose. But it was not his intent or purpose to provide her with means to engage in any enterprise or business or to promote any object wholly foreign to her maintenance in this liberal manner; within these limits, however, she is the sole judge of her expenses. If the executors think she is extravagant in her expenses socially, for pleasure or otherwise, they may not limit her means on that account. She is mistress of her own life, and independent of them in this respect. The testator evidently reposed full confidence in the judgment and intelligence of his wife, and desired to place her in such a position financially that she could freely live a life of comfort, unlimited in her manner of living except by her own wishes, and he seems by his will to have accomplished this purpose.

In the clause "the amount required by my wife for her maintenance" the word "required" is not used in

---

Wagner v. Beadle.

---

the sense of the amount necessary or needed, but indicates the amount which she may request or demand for such purpose.

This indicates sufficiently the views of the court. We do not understand that any real specific request of the widow has been frustrated by the refusal of the executors to comply with her wishes, but, an excess of income having accumulated, the question was presented as to what her rights would be in case she should demand funds for a purpose other than maintenance and support; and for their mutual guidance in the future this application was made as a friendly suit. For the purpose of this action the widow demanded of the executors the sum of \$2500, for the purpose of distributing it among the children. This we do not think is within the scope of her rights under the will, and can not be enforced.

The district court held that the entire net income from the estate was the absolute property of the widow, regardless of the purpose for which she desired to use it. We can not concur in this conclusion.

The judgment of the district court is reversed.

---

CHARLES H. WAGNER, *Appellant*, v. J. G. BEADLE *et al.*,  
*Appellees*.

No. 16,525.

SYLLABUS BY THE COURT.

1. VACATION OF A JUDGMENT—*Fraud*. The fraud for which a judgment may be set aside must be actual fraud, involving intentional wrong, as distinguished from legal or constructive fraud.
2. ——— *Same*. Assuming, but by no means deciding, that the rule forbidding a judgment to be set aside for fraud in a matter thereby adjudicated does not apply where the defendant had no actual notice of the pendency of the action, no ground for its vacation is established by a showing that it was based

---

Wagner v. Beadle.

---

on a claim insufficient in law but admitting of assertion in good faith.

3. ——— *Limitation of Action.* One against whom a decree quieting title has been rendered upon publication service and without actual notice can not, after the lapse of three years, have the judgment set aside as fraudulent merely by showing that the plaintiff's title was based solely upon a tax deed which showed upon its face that it was not effective as a conveyance.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Affirmed.

*Lee Monroe, and George A. Kline, for the appellant.*

*O. H. Foster, Edgar Foster, and Fred J. Evans, for the appellees.*

The opinion of the court was delivered by

MASON, J.: On April 18, 1903, F. C. Puckett began an action to quiet title against Charles H. Wagner, upon whom service was made by publication. The petition was in the statutory form, alleging merely title and possession in the plaintiff and an adverse claim by the defendant. Judgment by default was rendered June 23, 1903. On April 28, 1909, Wagner began an action against J. G. Beadle (a purchaser from Puckett) to set aside the judgment on the ground that it had been obtained by fraud. He was denied relief and appeals. The facts upon which he relies for a recovery, as developed by the evidence, are that he knew nothing of the judgment until more than three years after its rendition, and that Puckett had no title except under a tax deed, issued November 5, 1902, which was so defective that the five years statute of limitation could not be invoked in its behalf. His argument is that as the deed showed on its face that it did not convey a good title Puckett necessarily knew that he was not entitled to a decree against Wagner,

and was guilty of fraud and imposition upon the court in asking and obtaining one.

Whether the tax deed conveyed a title was the very question involved in the action brought by Puckett. If Wagner had had actual notice of the proceeding he could not avail himself of any false representation in that regard, under the familiar rule that the fraud for which a judgment may be set aside must be external to the matter adjudicated. (*Plaster Co. v. Blue Rapids Township*, 81 Kan. 730.) But he maintains that that rule applies only where the defendant knew of the pendency of the suit and so had a real opportunity to interpose a defense. This contention is supported by what was said in *Dunlap v. Steere*, 92 Cal. 344, where, however, the constructive service was based on a willfully false affidavit. That case quotes a statement to the same effect from the opinion in *Irvine v. Leyh*, 102 Mo. 200, but the view there expressed seems in fact to have been that of but a minority of the court. (*Ruhe v. Buck*, 124 Mo. 178, 203; *Irvine v. Leyh*, 124 Mo. 361.) Other cases cited by the California court, including *Adams et al. v. Secor*, 6 Kan. 542, tend to justify its conclusion. The case of *Schroer v. Pettibone*, 163 Ill. 42, has the same tendency. If a defendant who knows nothing of an action until after judgment has been rendered is barred from challenging its good faith, injustice may often result; but if under such circumstances he may question the truth of the petition a decree rendered upon constructive service must always lack finality. The statute (Code 1909, § 83) guards against the practical ill effects of treating such a decree as an actual adjudication by preventing it from becoming absolute until the expiration of three years. But we need not now determine whether one who has had no actual notice of the pendency of an action against him may attack the judgment for fraud in a matter directly involved therein. Assuming such to be the case, the appellant can derive no benefit from

the principle, for he has failed to bring himself within its operation. The fraud for which a judgment may be set aside by action must be of the same kind referred to in the statute (Code 1909, § 596, subdiv. 4) permitting such relief on motion, of which it was said in *Laithe v. McDonald*, 7 Kan. 254:

“The word ‘fraud’ in this statute is used in its common, direct sense. It means ‘fraud in fact,’ not ‘fraud in law.’ It embraces only intentional wrong—those acts done by the successful party with a knowledge of their criminality, and with the purpose of thereby depriving his adversary of some right.” (Page 264.)

Puckett's tax deed, as has been said, was upon its face ineffective as a conveyance of title. But it does not follow that he knew this. Indeed, if he had been aware of the requirements of the law in that regard it may fairly be supposed that he would not have accepted the deed or that he would have surrendered it and asked for a better one. The presumption that every one knows the law does not extend so far as to make one guilty of fraud who asserts that to be the law which a court of last resort has declared to be otherwise. Wagner had for six years failed to pay taxes on his land. If the county officers had complied with the statutes his title would have been annulled and a deed would have been executed cutting off his interest absolutely. The right to the property which he still retained resulted solely from technical defects in the proceedings for the enforcement of his obligation to pay taxes thereon. He can not maintain that a denial of his title necessarily involved bad faith. Puckett paid the taxes, and, if the statutes had been pursued, would have become the owner of the land. He took the deed that was furnished him and began an action to quiet title. His assertion in his petition that he owned the land, although untrue as a legal proposition, was not a fraud in itself, nor was it evidence of a fraudulent purpose. After the judgment had been



---

Hollingsworth v. Telegraph Co.

---

rendered Wagner had a right to have it reopened upon a showing that he had received no actual notice of the action and that he had a valid defense, provided he applied therefor within three years. His present action is in effect an application of that character, and to allow a recovery upon it would be to permit him to have the judgment vacated after three years upon the very grounds which the statute requires to be presented before the expiration of that period.

The judgment is affirmed.

---

MERLE HOLLINGSWORTH, *Appellee*, v. THE WESTERN  
UNION TELEGRAPH COMPANY, *Appellant*.

No. 16,528.

SYLLABUS BY THE COURT.

**DAMAGES—Exemplary—Amount of Award—Negligent Delivery of a Telegram.** In an action for damages for the failure to deliver a death message, *held*, that the evidence shows such wanton and reckless disregard of the rights of the plaintiff as to warrant exemplary damages, and that the sum of \$700 allowed by the jury is not excessive.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed May 7, 1910. Affirmed.

*George H. Fearons, Charles Blood Smith, and Samuel Barnum*, for the appellant.

*J. B. Larimer, and Charles F. Spencer*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff sued for damages occasioned by the failure of the defendant to deliver a telegram informing her of the dangerous illness of her father. The telegram was sent from Carthage, Mo.,

March 7, 1908, at 9:30 P. M. It was addressed to the plaintiff at her residence, No. 626 Tyler avenue, Topeka, and was received at Topeka at 9:40 P. M. It was not delivered until about ten o'clock the next morning, and the plaintiff failed to reach the bedside of her father until several hours after his death, which occurred after midnight, March 8. If the telegram had been promptly delivered on the night that it was sent she could have taken an earlier train and reached her father's bedside about nine hours before his death. On account of not having received an answer to the first telegram, a second was sent from Carthage on the morning of the 8th, and the plaintiff repaid her sister the toll for both, amounting to \$1.60. The jury awarded her \$700 damages. The defendant appeals.

We find nothing substantial in any of the claims of error with respect to the introduction of evidence or the instructions. The only real question in the case is whether the damages are excessive. The testimony of the defendant was that the message was sent out for delivery within ten minutes after it was received, and that it was taken to the house where the plaintiff lived. She and her sister occupied only a part of the house at No. 626 Tyler avenue, and it was admitted that neither of them was at home at the time and that they did not return until some time after ten o'clock that night. The rules of the company do not provide for the delivery of messages between midnight and eight o'clock A. M. This message was sent out on the first delivery the next morning, which was Sunday, and was delivered to the plaintiff about ten o'clock in the forenoon.

The evidence tending to show that an attempt was made to deliver the telegram on the night it was received consisted of the testimony of the delivery clerk, who testified that he remembered the message coming

---

Hollingsworth v. Telegraph Co.

---

in and knew he sent it out by a boy. The delivery sheet was introduced in evidence, showing that the message was sent out at 9:45 P. M. and returned at 10 P. M. The witness who made the entries on this sheet testified to them. He also testified that this was the only message he sent with the boy on that trip. The messenger, a boy seventeen years old, testified that he took the message and went first to No. 624 Tyler avenue, and was told on inquiry that No. 626 was next door south; that he went there and knocked four or five times, but was unable to raise anyone; that it was a double house; that he then went to the south half of the house and inquired if they could tell him where the party was that lived at No. 626; that he was informed there that the party had not been home for several days; that he made other inquiries, but was unable to deliver the message, and returned it.

On the part of the plaintiff, Mrs. Garrigus testified that she lived in a part of the house at No. 626 Tyler avenue; that she was alone in the house that night; that there was a light in the front room and in the dining room; that no one came to the house inquiring for the plaintiff or left any word or any message for her that evening. The testimony of the plaintiff also shows that the place to which the telegram was addressed is only about five blocks from the telegraph office where it was received; that the plaintiff and her sister had lived at No. 626 Tyler avenue for one and one-half years; that the plaintiff, for about four years prior thereto, had been employed in the millinery business at Paxton & Paxton's store, and was acquainted with all the employees of that firm and with the people living on the east side of the street in her block, and that at the time the telegram was received her name appeared in the city directory, with her occupation given as that of a milliner with Paxton & Paxton, and her address as No. 626 Tyler avenue. It was also

shown in evidence that, it being Saturday night, the store where the plaintiff was employed remained open for business until ten o'clock, at which time the plaintiff left the store and went to her home. The defendant does not claim to have made any effort to deliver the telegram at the place where the plaintiff was employed.

Inasmuch as the jury may have disbelieved the testimony of the defendant tending to show an honest effort to deliver the message on the night it was received, and in view of the fact that no effort was made to deliver it at the plaintiff's business address, which could have been easily ascertained by referring to the city directory, the amount awarded by the jury can not be considered excessive.

The judgment is therefore affirmed.

PORTER, J. (dissenting): In this case there is an absence of evidence disclosing any such aggravated circumstances or wanton disregard of the rights of the parties as was shown in the case of *Telegraph Co. v. Gilstrap*, 77 Kan. 191, and in *Telegraph Co. v. Lawson*, 66 Kan. 660. The writer is therefore of the opinion that the plaintiff should be required to remit one-half of the judgment. As said by the court in *Telegraph Co. v. Botkin*, 79 Kan. 792:

"The award of exemplary damages should be measured according to the circumstances of aggravation or mitigation, and made reasonable in view of the conduct of the wrong-doer in the particular case. The amount should not be so small as to be trifling, nor so large as to be unjust, but such as candid and dispassionate minds can approve as a punitive example to warn against similar lapses from duty." (Page 796.)

WILLIAM P. GILBERT, *Appellee*, v. GEORGE GRUBEL, JR.,  
*Appellant*.

No. 16,530.

SYLLABUS BY THE COURT.

1. *CONTRACTS—Accrual of Action for a Breach—Performance Prevented by Defendant.* A owned a business located in Kansas City, Kan. He wished to dispose of a one-half interest therein to some person who was familiar with it and capable of becoming manager thereof, and with whom he might subsequently form a partnership. B, who claimed to understand the business, proposed to purchase one-half thereof, and they entered into an agreement which was, in substance, as follows:

B was to manage the business and receive out of the profits thereof the sum of \$15 per week for his services. When the profits amounted to the sum of \$800 A was to have the whole amount thereof, which was to be in full satisfaction for the one-half interest sold to B.

The contract was carried out as contemplated until the profits amounted to \$779.52, when A, without cause, forcibly ousted B and terminated the contract. *Held*, that a cause of action for damages accrued in favor of B immediately.

2. ——— *Measure of Damages for a Breach—Evidence.* In an action by B founded upon the facts above described the measure of his damages would be such sum as would fairly compensate him for the loss sustained. In estimating this amount it would be proper to consider the value of the property to which he would have been entitled if the contract had been completed, and how much of the agreement was unfinished at the time he was ousted.
3. ——— *Action for a Breach—Demurrer to Petition.* Where, in such an action by B, his petition alleges the execution of the contract, its performance in good faith by him until practically finished, and his wrongful exclusion from the opportunity to complete the contract and receive the benefit of the property thereunder as stipulated, a demurrer to such petition should be overruled.

Appeal from Wyandotte court of common pleas;  
HUGH J. SMITH, judge. Opinion filed May 7, 1910.  
Affirmed.

*J. E. McFadden, and O. Q. Claflin, jr., for the appellant.*

*John T. Sims, for the appellee.*

The opinion of the court was delivered by

GRAVES, J.: This action was commenced for the purpose of recovering damages for a breach of contract. The facts are sufficiently stated in the petition, which reads:

"The plaintiff for his cause of action against the defendant says:

"(1) That on the — day of December, 1906, for a valuable consideration moving between them, the plaintiff and defendant duly executed the written contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this petition.

"(2) That, at the time, the defendant was engaged in several kinds of business, one branch of which was being conducted in the name of the Kansas City, Kansas, Gravel Roofing Company, of which the defendant was the owner and sole proprietor; that the teams, wagons, tools, patterns and implements belonging to and used in said business were of the value of \$800.

"(3) That by the terms of said agreement the defendant employed the plaintiff to take charge of and manage said business, and agreed that he, the defendant, would take all the net profits of the business, and out of the same would pay the plaintiff the sum of \$15 per week until such time as the profits should equal the sum of \$800, and then he would, in addition to paying the aforesaid sum of \$15 per week, give the plaintiff for his said services a half interest in said company, and thereafter the profits should be divided equally between them.

"(4) That thereupon the plaintiff, at the request of the defendant, and pursuant to said contract, took charge of said gravel roofing business and the aforesaid property under therein, and managed the same successfully and profitably until on or about the first of July, 1907, when the defendant, in violation of said agreement, and without any cause for so doing, took the business and property used therein out of the possession and charge of the plaintiff, and refused to carry

out his said contract, against the will and without the consent of the plaintiff.

"(5) That the said business was well established, in good territory, in Kansas City, Kan., and had a good line of patrons; that said company did a large amount of business at a fair profit, and had no losses at any time; that the defendant kept all accounts relating to the business; that he collected all bills for work, and out of the proceeds thereof furnished all material to be used in the prosecution of the work, and the plaintiff simply received his \$15 per week from the defendant, but was not permitted to see and know the state of accounts except as he could keep them partially in memory.

"(6) The plaintiff says that said company made net profits on its contracts, and that during the time it was operated as aforesaid the same amounted to \$779.52, or within \$20.48 of the full amount it was necessary to earn, net, to entitle the plaintiff to a half interest in said business and the property used therein, under the terms of said contract, when the defendant wrongfully and forcibly ousted the plaintiff and refused to permit him to complete his contract.

"(7) The plaintiff says that said company was a going concern, and had a well-established, growing business; and a half interest therein would have been worth more than half the value of the property of the company, which had been increased by the addition of a horse and buggy, paid for out of the proceeds of the business at a cost of \$166, making the value of the property \$966, one-half of which the plaintiff has been deprived of, by the aforesaid wrongful conduct of the defendant; and the plaintiff has in like manner been deprived of his interest in the good will of said established business, which was worth \$500.

"(8) Plaintiff further says that he has at all times been ready, able and willing to perform said agreement in good faith on his part, and would have done so, if he had not been prevented by the defendant, as hereinbefore stated; that since he was ousted from said business he has lost the stipulated salary of \$15 per week, to his further damage \$150.

"Wherefore, by reason of the premises, the plaintiff demands judgment against the defendant for the sum of \$1134, the aggregate of his damages so as aforesaid sustained, and for costs."

## "EXHIBIT A.

"This agreement, entered into this — day of December, 1906, between George Grubel, jr., of the first part, and W. P. Gilbert, party of the second part, witnesseth, said party of the first part, owner and sole proprietor of business known as Kansas City, Kansas, Gravel Roofing Company, of its property and rights, to the value of eight hundred dollars, wishing to dispose of one-half interest of said business to said party of second part under the following conditions: First, that there shall be eight hundred dollars, with interest at six per cent per annum, paid to party of first part out of profits of the business. (Said) party of second part, for good and efficient services as manager, shall receive fifteen dollars per week as salary until the profits of the business has paid to party of the first part eight hundred dollars, with interest at six per cent per annum, as above said. Then party of second part is to be considered as having one-half interest in the company and to receive one-half of the profits.

"Witness our hands this — day of December, 1906."

To this petition the defendant filed a demurrer, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. This ruling of the court is claimed to be erroneous. It is contended that a cause of action did not and could not accrue upon the contract until the profits arising from the business had reached the sum of \$800, and according to the petition they amounted to only \$779.52. The petition, however, further alleges that when the profits had reached the latter sum the defendant, "without any cause . . . and against the will and without the consent of the plaintiff . . . wrongfully and forcibly ousted the plaintiff and refused to permit him to complete his contract." The defendant, having wrongfully and forcibly rendered it impossible for the plaintiff to complete his contract, can not take advantage of the plaintiff's failure to do so; he can not be permitted thus to profit by his own wrong. We think the demurrer was properly overruled.



The answer was, first, a general denial; second, an admission of the contract; and, third, an allegation that the plaintiff did not understand the business, and by his mismanagement operated it at a constant loss. The reply was a general denial. The case was tried to a jury.

It is claimed that error was committed by the court in permitting the plaintiff to establish his case by secondary and incompetent evidence. The complaint, as stated in the brief of the defendant, reads:

"The evidence of the plaintiff was from the beginning to the end made up of conclusions, mere guesses and assumptions, and was secondary. There was a regular set of books kept, in which all of the transactions pertaining to the business were recorded; books from which it could be shown the exact amount of business done, the cost of all labor and material employed in carrying on the work. The plaintiff as well as the defendant had access to these books at any and all times, and yet, without any effort by the plaintiff to have these books brought into court, without any knowledge on the part of the plaintiff as to what they contained, without any showing that they had been lost or destroyed, or that they were beyond his control, the court, over repeated objections, allowed the plaintiff to give evidence of his own manufacture concerning the very essential things he was obliged to prove in order to recover."

This statement is somewhat overdrawn, but not entirely without foundation. The court doubtless anticipated that when the defendant made his case the testimony would be sufficiently supplemented and corrected to cure whatever defects had occurred. It ought to be said in this connection that the defendant had possession of all the books of account and was familiar with them, while the plaintiff had nothing, not even his own memoranda (which he had from time to time turned over to the defendant), from which to make up the accounts of the business. He was compelled to testify from memory, and to estimate quantities and values.

The defendant, in making his case, produced the books containing a complete history of the business, which he had kept, and testified fully concerning the same. The evidence of the plaintiff and the defendant constitutes the whole of the material and important testimony in the case. We think the evidence, when considered as a whole, was sufficient, and that no material or prejudicial error was committed in its admission.

The evidence concerning the plaintiff's management of the business was not admitted for the purpose of showing whether it had been profitable or not. The plaintiff did not agree to manage the business so as to make it profitable; he only undertook to give "good and efficient services as manager." The purpose of this evidence was, therefore, to show whether or not the plaintiff was so inefficient and incompetent as to justify the defendant in terminating the contract as he had done. In establishing a fact of this nature the distinction between the best and secondary evidence, and between the introduction of books of original entry and the personal memory of witnesses, are not so important as they would be were a different subject being investigated. Here the accurate ascertainment of accounts between the parties, the price of materials, a detailed statement of receipts and disbursements, while proper, were not controlling. The real question was whether or not the plaintiff had been grossly incompetent, indifferent, or reckless in his management. Upon this question evidence not technically in accordance with strict legal rules might be permitted without committing prejudicial error.

It is claimed that the court erred in the instructions given, and in the refusal of those requested by the defendant. These instructions, because of their length, can not be reproduced here, and will be considered generally.

Some of the instructions given, if considered alone, might seem to be misleading, but, when considered as

---

Gilbert v. Grubel.

---

a whole and with reference to the theory upon which the case was tried, seem to state the law clearly and correctly. The controlling questions in the case were these: If the defendant wrongfully and forcibly terminated the contract just when it was about completed on the part of the plaintiff, as the latter claims, and thereby made its completion impossible, the defendant would be liable to the plaintiff for damages which would compensate him for his loss. On the other hand, if, as the defendant claims, the plaintiff was ignorant of the business, and by his mismanagement caused continuous losses instead of profits, then the defendant might terminate the contract at any time. The instructions of the court presented these questions to the jury in a manner that can not be fairly criticized.

As to the measure of damages, it was agreed by the parties that if the contract was carried out as contemplated the plaintiff should have one-half of the business, which was valued by them at the time the contract was entered into at the sum of \$800. Assuming that the contract was so carried out on the part of the plaintiff until it had yielded the amount of profits stipulated, less \$20.48, and then the defendant wrongfully terminated the contract, it seems that the reasonable value of the property which the plaintiff was to receive and which he had earned, within a mere trifle, would not be unreasonable compensation for his loss. It is about what the ordinary mind would regard as fair and just.

It is urged, however, that inasmuch as the full amount of \$800, the sum stipulated, had not been earned in profits, the plaintiff was without a remedy. If the deficiency had been only 20 cents, we suppose the same rule would be said to apply. It is said that the contract does not say anything about a substantial compliance with the agreement, but only that the profits must equal \$800. True, but neither does the

contract say that the defendant may at his pleasure terminate the agreement at a time when the plaintiff will suffer great loss for which he can not recover compensation; on the contrary, the time is unlimited within which the stipulated profits shall be earned. Where parties in their contracts do not cover contingencies which are liable to occur, they will be presumed to have intended that if an unexpected contingency should arise they will each do whatever, under the circumstances, will be fair and just. When courts are called upon to adjust differences between parties in such a case, they must be guided in their deliberations by the universally recognized principles of justice and common fairness between man and man. A technical and literal interpretation of the contract which violates manifest justice will not be adopted, but the language of the agreement will be extended or restricted so as to render it just and fair, upon the presumption that the parties so intended. We can not concur with the interpretation contended for by the defendant in this case.

Other questions are presented by counsel, but as those discussed dispose of the case none other need be considered. The judgment of the trial court is affirmed.

PORTER, J. (dissenting): There were two sides to this lawsuit. I can not agree that the plaintiff's evidence was admitted for the purpose of showing that he had not been inefficient in the management of the business. That he had not been efficient was a matter of defense. It is true, the petition alleges that he had been efficient and competent, but the relief was demanded on the ground that the profits of the business amounted to \$779.52, a sum so near the amount stipulated in the contract that equity would regard the condition as substantially complied with. He undertook to show that the profits had amounted to this sum, and

was permitted to introduce secondary evidence for that purpose, without any attempt to procure the best evidence; and other incompetent testimony was admitted in support of the same contention. It is true that he stated that in his opinion the profits approximated the amount claimed, but there was no competent evidence offered showing that the profits of the business amounted to as much as one dollar. The plaintiff knew nothing of the cost of the material, except in a few instances; he knew nothing about the amount required by the firm to keep contract work in repair, and it was impossible for him or for the jury, from his evidence, to determine that there had been any profits. He testified to the amount expended for labor during a portion of the time the contract was in force, and he stated that the business, from its nature, was generally considered profitable. Of course, equity would not deny him relief because the profits did not amount to \$800, but, on the theory of his petition, it was necessary for him to establish by a preponderance of the evidence that there had been some profits; it was also necessary in order to determine the proper measure of his damages. He may be entitled to recover damages, but the case should be reversed and a new trial ordered because of the errors in the admission of evidence.

WILLIAM S. READ, *Appellee*, v. MARY R. LOFTUS *et al.*,  
*Appellants*.

No. 16,531.

## SYLLABUS BY THE COURT.

1. **CONTRACT OF SALE—Stipulation Concerning Title—Acceptance of Warranty Deed—Merger of Conditions.** Whether a stipulation in a contract for the sale and conveyance of real estate to deliver at a future date an abstract showing good title, satisfactory to the attorney for the vendee, is merged in a warranty deed and a mortgage given for the purchase money, executed contemporaneously with the contract, is a question to be determined by an examination of the instruments and the situation, conduct and intention of the parties.
2. ——— *Same.* If the deed is accepted as performance of the conditions of the contract, it supersedes the stipulation. But if the parties agree and intend that the stipulation is to remain in full force and effect, it will not be considered as merged in the deed.
3. ——— *Possession and Improvements—Waiver of Stipulation as to Title.* Taking possession and improving the property is not conclusive evidence of a waiver of the stipulation of the contract as to title, especially where the improvements are made in pursuance of an express provision of the agreement.
4. ——— *Rescission—Laches—Possession—Reliance on Vendor's Promise to Perfect Title.* Where objections to the title shown by the abstract delivered in accordance with the contract are made by the vendee's attorney, in good faith, and, to obviate one of them, the vendor promises to prosecute an action to quiet the title, the continuance of possession by the vendee for a reasonable time in reliance upon such promises, without demanding rescission, is not such proof of laches as will necessarily defeat a rescission which was demanded after a refusal to take any step to remove the objections.
5. ——— *Rescission—Waiver of Stipulation as to Title.* The possession so taken and held, the making of improvements, and the delay in asking for rescission, so induced by the conduct and promises of the vendor, do not, as a matter of law, amount to a waiver of the stipulation relating to the title, but are proper matters to be considered in determining whether a rescission should be adjudged.

---

Read v. Loftus.

---

Appeal from Leavenworth district court; JAMES H. GILLPATRICK, judge. Opinion filed May 7, 1910. Affirmed.

## STATEMENT.

THIS action was brought by William S. Read, against Mary R. Loftus and Thomas J. Loftus, for the cancellation of a note and mortgage and the rescission of a contract under which they were given. This contract was made by letter, as follows:

"LEAVENWORTH, KAN., March 19, 1906.

"*Mrs. Mary R. Loftus and Thomas J. Loftus, Leavenworth, Kan.:*

"DEAR SIR—This will formally advise you that I will accept a warranty deed for real estate described as lots number twenty-two (22) and twenty-three (23) in block seventy-two (72), Leavenworth city, proper, and in settlement of same will deposit in hands of the cashier of the Leavenworth National Bank five hundred dollars (\$500), to be paid to Mary R. Loftus on the deliverance of abstracts of title to above-mentioned property, abstracts to show good title, to be satisfactory to my attorneys, on or before November 25, 1906. In further consideration of the delivery to me of the above-mentioned deed, I will give upon said property a mortgage as security for the payment of nine thousand five hundred dollars (\$9500), said amount to be paid in installments of five hundred dollars (\$500), to be paid on the first day of December and the first day of June of each year until all is paid; the first payment to be made on December 1, 1906, provided that the above-mentioned abstract of title has been delivered and such abstract shows good and sufficient title in you satisfactory to my attorney. It being understood that I may have the liberty to pay an additional sum of one hundred dollars (\$100) or any multiple thereof in advance of or at any time of any of the above-mentioned installments.

"Unpaid amount of above-mentioned principal to bear interest at the rate of five per cent (5%) per annum until paid.

"Insurance for the benefit of Mary R. Loftus will be carried on said property for such an amount as is represented in obligation unpaid.

---

Read v. Loftus.

---

"I also agree to make improvements, consisting of machinery, repairs on buildings, labor and material, to an extent of not less than three thousand dollars (\$3000).

"Yours very truly, WILLIAM S. READ."

The defendants accepted this offer by signing and indorsing the same, thus: "Accepted March 19, 1906.—Mary R. Loftus, Thomas J. Loftus."

A copy of this contract was deposited in the bank referred to therein, together with a certified check for \$500, with direction indorsed upon the agreement as follows:

"I deposit herewith five hundred (\$500) dollars, which you are to hold and pay over to Mary R. Loftus whenever she shall have complied with the terms and conditions of the within proposition.

WILLIAM S. READ."

From the findings of the court the following facts appear: A warranty deed and mortgage were executed about the same time that the contract was made. The intention of the parties was to leave these papers with the bank, but in the interval that elapsed before all the signatures could be obtained this was overlooked and the papers were delivered to the respective grantees and appear upon record, not, however, in pursuance of any new arrangement or understanding, nor with the intention to change or modify the conditions of the contract. An ice-and-cold-storage plant was upon the lots described in the contract, but was out of repair, with many parts missing, and it was necessary to repair, improve and overhaul the building and machinery to put the plant in running order. The plaintiff immediately took possession under the contract, repaired the building and made many improvements upon the plant, expending therefor the sum of \$4456.49. He paid the first installment of interest, \$237.50, due September 1, 1906, on the note accompanying the mortgage, and \$190.30 for insurance, and performed the conditions of



## Read v. Loftus.

the contract on his part. A few days before November 25, 1906, he requested the defendants to submit the abstract of title for examination, but it was not submitted until about December 1, 1906, when it was handed to the plaintiff's attorney for examination. On December 7 this attorney, after examining the abstract, refused to approve the title, and submitted written objections, as follow:

"(1) There are three tax deeds on the property from the city to J. C. Douglas, issued March 28, 1873, July 19, 1880, and April 20, 1882, respectively.

"(2) There is a deed from Higginbotham to Douglas, dated June 18, 1881.

"(3) There is unpaid a sale certificate from the city to Thomas Quinn, for special taxes for year 1868. No deed issued on certificate.

"(4) Sale of lots by county to W. D. Kelly for delinquent taxes, 1883.

"(5) Special tax for paving and curbing Cherokee, in the sum of \$119.07, not marked paid.

"(6) A life estate in 1-6 said lots is outstanding in Dacotah S. Ryan.

"(7) Mary R. Loftus was (apparently) the owner of a life estate . . . on March 20, 1906.

"(8) The fee in remainder is outstanding in the heirs of the body, born and to be born of Kate V. Sheedy, Jephtha D. Ryan, Mary R. Loftus, Thomas C. Ryan, and Ethan B. Ryan.

"(9) On March 20, 1906, the following suits were (and still are) pending in the district court of Leavenworth county, which may ripen into judgment liens on said lots: Fred Woolfe & Co. v. Mary R. Loftus *et al.*; Walter S. Gregg v. Mary R. Loftus *et al.*; James B. Welch v. Mary R. Loftus *et al.*

"(11) The taxes of 1906 are unpaid."

These objections were made in good faith. Whatever title the defendants had in the premises came through the will of Mrs. Loftus's father, in which she and her brothers and sisters were devisees, and by conveyances made by the other devisees to her. The defendants promised to remove the objections, one of which was that a fee in remainder was outstanding.

As the defendants contended that such was not the effect of the will, they promised to have the question determined to the satisfaction of the examining attorney by a suit to quiet title or otherwise. The defendants then took back the abstract of title and have since retained it. Relying upon the promise to make the title satisfactory to his attorney, the plaintiff continued in the possession of the plant and continued to make necessary improvements thereon, but made no further payments on the consideration. The defendants left for New York, where they remained for the greater part of the following months, during which time there were negotiations between the parties looking toward a different contract or disposition of the property, but nothing resulted. The plaintiff did not intend to waive his objections to the title or to accept any title not satisfactory to his attorney, nor did the defendants rely upon any waiver, and, although inducing the plaintiff to believe that the title would be made satisfactory, they took no steps to do so and the defects were not removed. In the fall of 1907 the defendants gave notice that they would do nothing further with respect to the title. Thereupon, on October 5, 1907, the plaintiff served upon them a written notice of his election to rescind the contract because of their failure to comply with its conditions. The rental value of the premises, without the repairs and improvements made by the plaintiff from the time he began the operation of the plant until he gave notice of the rescission (a period of seventeen months), is \$75 per month; with the improvements, the rental value is \$150 per month.

Upon the foregoing facts a judgment was entered rescinding the contract, and for the cancellation of the note and mortgage upon the delivery to the clerk of a conveyance of the premises to Mary R. Loftus.

The court charged the plaintiff with the rent of the premises at \$75 per month, credited him with the interest and insurance paid, and the sum expended for

---

Read v. Loftus.

---

repairs and improvements, and found that there was due to him \$4109.29, which was charged as a lien upon the premises.

*James F. Getty, F. D. Hutchings, and D. F. Carson,*  
for the appellants.

*A. E. Dempsy,* for the appellee.

The opinion of the court was delivered by

BENSON, J.: The defendants predicate error upon the orders overruling an objection to evidence under the petition, a demurrer to the evidence, and a motion to set aside the findings of fact. It is argued that the contract was merged in the deed and mortgage, and that the only remedy in case the title is defective or should fail is upon the covenants of the deed; also, that the plaintiff waived any right to rescission by long-continued delay. It is further urged that the amount allowed for improvements was excessive, and that the defendants were entitled to rent of the property as improved by the expenditures with which they are charged.

The principal question is whether the provisions of the contract concerning the title were waived by the acceptance of the deed. It is urged in support of the alleged merger that the contract was superseded and extinguished by the deed, and that all its stipulations were merged therein. That this is the effect of a deed when subsequently accepted in satisfaction of the conditions of an executory contract must be conceded. This conveyance, however, was made contemporaneously with the contract, which contained provisions for the future delivery of an abstract showing a good title satisfactory to the plaintiff's attorney. No payment was made at the time; even the \$500 deposited remained in the bank, to be delivered only when the abstract should be approved. The provision for an

abstract to be furnished in the future, and the clause requiring an expenditure of \$3000 for improvements, indicate that the transaction was not considered or treated by either party as finally closed by the delivery of the deed and mortgage. In addition to this, the court found that these papers were delivered contrary to the intention of the parties, and not with any intention to waive or modify the terms of the agreement.

It was held in *Hampe v. Higgins*, 74 Kan. 296:

"A written contract for the sale of real estate is superseded and extinguished by a subsequent deed of conveyance between the same parties which covers in its provisions all of the stipulations contained in the contract." (Syllabus.)

In the opinion it was said:

"In our view the evidence furnished by the face of the two instruments and also the extrinsic circumstances shown indicate that the parties intended the deed as a complete settlement of all further controversy concerning the sale and conveyance of the land. The transaction was initiated by the contract of sale and closed with the deed." (Page 298.)

In this case the deed did not cover the stipulations contained in the contract, and the circumstances do not conclusively show, as they were held to do in that case, that the transaction was closed. On the contrary, both parties treated it as still open, and the contract as being in force. In various cases cited in support of the alleged merger it will be observed that the doctrine rests upon the acceptance of the conveyance as a performance of the contract. Thus it is said in section 850a of volume 2 of the second edition of Devlin on Deeds:

"The rule applicable to all contracts that prior stipulations are merged in the final and formal contract executed by the parties applies, of course, to a deed based upon a contract to convey. When a deed is delivered and accepted as performance of a contract to convey the contract is merged in the deed."

It was held in *Slocum v. Bracy*, 55 Minn. 249, where this question of merger was considered, that it is competent to prove by parol that the deed was not accepted as a performance of the contract. The court said:

"There would be a very clear distinction . . . between plaintiffs' merely accepting the instrument as a conveyance and their accepting it as performance of defendants' contract.

"We therefore think that it would have been competent for plaintiffs to have proved by parol the allegation of their reply that their acceptance of the deed as performance of defendants' contract was only conditional. Such evidence would not contradict the terms of the deed, or tend to prove that it was not to be operative as a conveyance according to its terms." (Page 253.)

It can not be said, as a matter of law, that the contract was merged in the deed. No inconsistency appears between the contract and the deed, and the provisions of the former were not necessarily superseded by the latter. (*Witbeck v. Waine*, 16 N. Y. 532; *Nothe v. Nomer*, 54 Conn. 326; *Close v. Zell*, 141 Pa. St. 390.) The court found that no merger was intended. It is insisted, however, that this finding is not supported by any evidence. The conduct of the parties was a proper matter to be considered, as well as the language of the instruments, and in addition to this there was the testimony of the plaintiff that it was agreed that the mortgage and the deed should remain in the bank, but that carelessly or unintentionally the exchange was made, instead of leaving them there as intended. In the light of this testimony and of all the circumstances we can not say that the finding is not supported by any evidence.

The question whether the plaintiff waived the objections to the title was clearly one of fact. The mere circumstance that he took and held possession of the property is not conclusive. Possession was expressly stipulated for in the contract, and his continuance in

---

Read v. Loftus.

---

holding it is explained by the repeated promises of the defendants to remove the objections. The nature of the remedy which they proposed, namely, a suit to quiet title, would necessarily require time, and a reasonable delay for that purpose should not be construed as a waiver until some act was done or notice given evincing an intention to refuse to comply with the promise. When such notice was given the plaintiff acted promptly, by serving his notice of rescission, offering to reconvey the premises, and demanding a return of the note and mortgage.

The court is not called upon to determine the validity of the objections made to the title. The parties by their contract agreed that the title should be made satisfactory to the plaintiff's attorney. This was not done. Objections which appear upon their face to be substantial were made, and were not removed, and a final refusal to obviate them was given. That they were made in good faith is found by the court. That such a stipulation is valid and will be enforced is not an open question in this state. (*Hollingsworth v. Colthurst*, 78 Kan. 455.) The plaintiff was not required to accept a title which he had been advised was defective, and incur the risk of litigation, expense and loss. He had provided against such hazards by a stipulation that the title should be satisfactory to his attorney.

Again, it is urged that there should be no recovery because the plaintiff failed to introduce the abstract in evidence. This was unnecessary. It was in the hands of the defendants, and it was not necessary for the court to examine it, for the sufficiency of the title was not in issue. It was only necessary to show that it had been examined by the plaintiff's attorney, and, in the absence of bad faith, his objections were sufficient.

The petition contained allegations that fraudulent

representations concerning the title had been made. As there was no finding of fact supporting these allegations it is argued that there can be no recovery. Notwithstanding these averments the cause of action was not for fraudulent representations, but for the failure to make title as provided in the contract.

Another contention of the defendants is that the evidence disclosed the fact that the plaintiff, before entering into the contract, consulted with an attorney concerning the condition of the title, and that he must have relied upon the advice of the attorney. It is sufficient to say that notwithstanding such consultation he made these stipulations with reference to the title. Whatever advice he may have received, he had a right to secure such guaranties and make such conditions as the other party was willing to concede.

It is contended that instead of allowing the *expenditures* made for improvements the court should only have allowed the *value* of the improvements, but this is not the rule in such cases. Upon the rescission of such a contract the party not in default is entitled to recover the necessary expenditures he has properly made upon the faith of the performance of the agreement by the other party. (*King v. Machine Co.*, 81 Kan. 809; 8 A. & E. Encycl. of L. 637, 638.) Especially should this be so in a case where the contract expressly provides that he shall make such expenditures. Besides, it is said in the argument for the defendants that "we are not controverting the amounts paid, but we are seriously controverting the question as to whether they went into repairs and improvements, or operating expenses, and we make our objections upon that ground." The amount expended for improvements and repairs was determined by the court, upon competent evidence, and the finding thereon can not now be disturbed.

Finally, it is urged that the court should have allowed rent for the property in its improved condition.

---

Howell v. Garton.

---

Manifestly this would be true if the defendants had been charged with interest upon the expenditures, but as they were not they should only recover the rent of the property as it was without the improvements.

That an agreement to purchase real estate may be rescinded where the vendor refuses or is unable to convey a merchantable title, as agreed, will not be controverted. The facts found by the court bring the case within the operation of this principle. The consideration had not been paid, except a little interest; the improvements made in pursuance of the agreement are upon the property of the vendor, and the rights of both parties were protected by the decree.

Finding no error in the proceedings, the judgment is affirmed.

---

GEORGE S. HOWELL, *Appellee*, v. JAMES W. GARTON, *Appellant*.

No. 16,582.

SYLLABUS BY THE COURT.

WORDS AND PHRASES—"Unknown Heirs"—*Publication Service*.

The term "unknown heirs," as used in the sections of the code providing for service by publication in cases relating to real property and where the relief demanded is to exclude defendants from any interest, title or estate in real property, means all kinds of heirs, including heirs of heirs of such defendants as well as the legatees of heirs.

Appeal from Gray district court; GORDON L. FINLEY, judge. Opinion filed May 7, 1910. Reversed.

*Thomas A. Scates*, and *Albert Watkins*, for the appellant; *E. H. Madison*, of counsel.

*Bennett R. Wheeler*, and *John F. Switzer*, for the appellee.



The opinion of the court was delivered by

JOHNSTON, C. J.: This case involves the meaning of the term "unknown heirs," as used in the sections of the code which provide for service by publication in cases relating to real property and where the relief demanded is to exclude defendants from any interest, title or estate in the real property. The contention arises over the effect to be given a judgment which purports to quiet the title to a tract of land formerly owned by Abbie A. Little. She died intestate in 1895, leaving her daughter, Hattie A. Davis, as her sole heir. Hattie died in Pennsylvania in 1903, leaving a will, in which she gave all her property to her husband, James M. Davis. In 1903 the will was admitted to probate in Pennsylvania, but no record of it was made in Kansas until after the judgment referred to had been rendered, nor until September 30, 1907. On July 1, 1905, F. M. Luther, who had obtained a tax deed to the land, brought an action to quiet his title as against Abbie A. Little, if living, or, if dead, against her unknown heirs, and on September 1, 1905, a judgment as prayed for was rendered. In 1906 Luther conveyed the land to James W. Garton, who purchased without notice of the death of Mrs. Little or the existence of the will of her daughter. On August 1, 1907, James M. Davis made a quitclaim deed to the land to George S. Howell, who brought this action of ejectment on October 3, 1907. If the judgment quieting title is valid, Davis had nothing to convey and Howell acquired no interest in the land. Instead of applying to the court to set aside the judgment and let him in to defend, under section 77 of the code (Gen. Stat. 1901, § 4511; Code 1909, § 83), he chose to treat the judgment as void. His contention is that as Hattie A. Davis, the immediate heir to Abbie Little, was dead when the action against Mrs. Little and her unknown heirs was begun, no one was brought into

court, no interest was affected by the action, and as the judgment reached no one it was therefore open to collateral attack by Davis or his grantee.

The statute applicable to service by publication in cases of this character at the time this action was brought provides, among other things, that "the plaintiff may have service by publication upon said defendants or any of them, as though the defendants or any of them were alive at the time of the commencement of such action, and may also have service upon the unknown heirs, devisees, administrators, executors and trustees of any such defendants, as though the defendants were dead at the beginning of such action, and the service shall be had, proof made and decree rendered as hereinafter set out." (Laws 1905, ch. 326, § 1.) Does the term "unknown heirs," as used in the statute, apply to an heir of an heir, or rather to anyone in the line of succession from the deceased person? The word "heir" is sometimes used in its strict primary sense as including only one to whom an estate had already descended from a deceased ancestor, while in other cases it is applied to one whose ancestor is living. It is sometimes held to mean those who take only by right of blood relationship, and in other cases covers adopted children and persons not heirs of the body who take by operation of law. It has been used in a limited sense to designate children alone, or in a more comprehensive sense to include children and grandchildren, and also husband and wife. It has been held to include legatees and next of kin, as well as other classes of those who may become entitled to the property of another upon his death, the construction in each case depending upon the intention with which the term was used in the instrument or statute, and that is to be determined largely from the context of the instrument or statute and the circumstances surrounding or inducing the execution or enactment of the same. (21 Cyc. 408.) The context and

---

Howell v. Garton.

---

purpose of an instrument or a statute in which the term is used may indicate clearly that it is used in a limited sense, or it may show plainly that it is used in a comprehensive sense, including heirs of all degrees. So it has been decided that "the word heir is not limited in its meaning to one to whom an estate of inheritance has descended from his immediate ancestor, but a person is the heir of one from whom he has inherited by several successive descents." (*Castro v. Tennent*, 44 Cal. 253, syllabus.) In interpreting an Illinois statute which prohibited a party from testifying in a case where a party sues or defends as heir of a deceased person it was held that the word "heir" should be taken in its general and comprehensive sense, and that it included "the heirs of heirs *ad infinitum*." (*Merrill et al. v. Atkin*, 59 Ill. 19, syllabus. See, also, *McKinney v. Stewart*, 5 Kan. 384; *Dodge v. Beeler*, 12 Kan. 524; *Ewing v. Barnes*, 156 Ill. 61; *Brooks v. Evetts*, 33 Tex. 732; *Barber v. Pittsburgh &c. Railway*, 166 U. S. 83; *Howell v. Ackerman, &c.*, 89 Ky. 22; 15 A. & E. Encycl. of L. 320.)

The history and purpose of the statute indicate that the legislature used the term "unknown heirs" in its broader and more comprehensive meaning. At first the code provided for service by publication on unknown heirs of any deceased person without naming them. (Gen. Stat. 1868, ch. 80, § 78; Gen. Stat. 1901, § 4512.) Then there was a later provision that if it could not be ascertained whether the owners of the record title to land were living or dead service might be made as though they were alive, and upon the unknown heirs of such defendants as though defendants were dead. (Laws 1903, ch. 385.) Afterward, in 1905, the statute was amplified, and as the title indicates was intended to cover not only nonresidents of the state but persons whose residence is unknown, whether they were within or without the state. (Laws 1905, ch. 326.) Some modifications of these provisions were

made in chapter 257 of the Laws of 1907, and that statute appears to have been substantially reenacted in the code of 1909. (§§ 79, 80.) The manifest purpose of these changes was to enable the parties effectually to clear up and adjust the title to real property, and to that end facilitate the bringing into court of those claiming or who might claim an interest adverse to the occupying plaintiff. If the statute only applies to immediate heirs it would be ineffectual in all cases where the immediate heir was dead and plaintiff was unable to ascertain that fact. The more reasonable view is that the act was intended to cover all who were in line of inheritance—those entitled to take by succession from generation to generation—and includes the heirs of heirs. Following this liberal rule of interpretation, the term includes all who take real property by reason of the death of the owner, and it therefore fairly includes legatees as well as those who take by descent. All the property of Hattie A. Davis passed by her will to her husband, and, there being no children, all of her property would have passed to him if she had died intestate. The court acquired jurisdiction by the constructive service which justified it in the judgment that was rendered, by which both he and his grantee are bound.

It follows that the judgment must be reversed, with directions to enter judgment in favor of appellant.

---

Brice v. Saylor.

---

HARRY BRICE, *Appellee*, v. E. T. SAYLER *et ux.*, *Appellants*, and B. J. G. BETTELHEIM *et al.*, *Appellees*.

No. 16,534.

SYLLABUS BY THE COURT.

**QUIETING TITLE—Pleading—School Land—Invalid Forfeiture—Purchase by Holder of Defective Tax Deed—Parties Entitled to Complain.** The state issued to a purchaser a certificate of purchase of school land. A forfeiture was attempted, and a certificate was issued to a second purchaser, but the forfeiture proceedings were void. The land was sold for taxes, a tax deed was issued, and the tax purchaser paid out the first school-land certificate and obtained a patent. The tax proceedings were defective. In an action by the patentee to quiet his title the two holders of school-land certificates set up their titles and asked for affirmative relief. Judgment was rendered for the patentee, and only the second certificate holder appealed. *Held*, it is no longer material whether the plaintiff proceeded under the statute or in equity, and the appellant can not complain of defects in the tax proceedings.

Appeal from Gray district court; GORDON L. FINLEY, judge. Opinion filed May 7, 1910. Affirmed.

*B. F. Milton, James B. Naylor, Robert Stone, and George T. McDermott*, for the appellants.

*Thomas A. Scates, Albert Watkins, and Harry Brice*, for appellee Harry Brice.

The opinion of the court was delivered by

BURCH, J.: Bettelheim held the land in controversy as the assignee of a valid school-land contract, issued in 1885. An attempt was made to forfeit his rights in 1895, but the proceedings were void. The land was resold in 1901, and Saylor became the assignee of the contract issued upon the second sale. The taxes on the land were not paid and it was sold to the county at tax sale in 1903. Brice took an assignment of the certificate of sale in 1906, procured a tax deed, paid out Bettelheim's contract, and obtained a patent in 1909. It may be conceded for the purpose of the decision that the

---

Brice v. Sayler.

---

assignment of the tax-sale certificate and the tax deed were invalid. Before the patent was issued Bettelheim tendered to the county treasurer the amount due on his contract, and Sayler tendered to Brice the amount of the tax lien. Both tenders were refused. After receiving his patent Brice brought suit to quiet his title. Bettelheim answered claiming title under the first school-land contract. Sayler answered claiming title under the second school-land contract. Judgment was rendered for Brice, and Sayler appeals.

In this court Sayler derides the tax proceedings under which Brice claims. Brice scoffs at the forfeiture proceedings which support Sayler's contract. Brice says he stands in Bettelheim's shoes. Sayler says Bettelheim's shoes were lost, and that Brice must recover on the strength of the tax proceedings and not on the weakness of the forfeiture proceedings. Bettelheim, having been sent out of court barefoot, made no attempt to come up, and consequently can not be heard.

The key to the solution of this problem lies here: Sayler did not rest content with disputing the strength of Brice's title. He became an aggressor, put his own title in issue, and asked affirmative relief against Brice and Bettelheim. Bettelheim adopted the same course against Brice and Sayler, and the court was called upon to adjudicate, not the relative strength, but the actual validity, of each man's claim to the property.

Bettelheim claimed the elder title, and the first question was, Did the forfeiture proceedings cut him off? Sayler does not undertake to defend the service of the notice of forfeiture. It had no legal force, the second sale was a nullity, Sayler has no shadow of title, and consequently he went out of the case. The remaining question was, What effect did the tax proceedings have upon Bettelheim's unforfeited contract rights? Sayler had no interest in this question or its answer. The court decided in favor of Brice, and Bettelheim does not complain.

---

Mikesell v. Wilson County.

---

Since Bettelheim was the only person who could redeem from the tax sale, Sayler's tender to Brice amounted to nothing. It is not now material to Sayler whether the petition upon which Brice recovered was based upon the statute or conformed to the procedure in equity. Sayler was defeated on his own pleading and can not be prejudiced by Brice's recovery from Bettelheim.

The judgment of the district court is affirmed.

---

**E. D. MIKESELL, Appellee, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WILSON, Appellant.**

No. 16,537.

**SYLLABUS BY THE COURT.**

1. **PAROLE LAW—*Constitutionality.*** The "parole law" (Laws 1907, ch. 178; Gen. Stat. 1909, ch. 28, art. 5), as applied to this case, is not retroactive, nor is it in violation of article 1 of the fourteenth amendment to the constitution of the United States, but is valid.
2. **DISTRICT COURT—*Parole of Prisoner Held for Nonpayment of Costs.*** Where a person convicted of violations of the prohibitory liquor law is sentenced to a term of imprisonment in the county jail and also a fine is imposed as the penalty, and is adjudged to pay the costs and to stand committed till the fine and costs are paid, and where after the commitment to jail the governor of the state issues to the prisoner a full pardon, so far as he has the power, but the prisoner is held in jail for nonpayment of costs, the district court may parole the prisoner and six months thereafter may finally discharge such prisoner.
3. **COUNTIES—*Liability for Costs—Prisoner Paroled by District Court.*** If the prisoner be found insolvent and unable to pay or give security for the costs they must be paid by the county, and the county shall become liable therefor at the expiration of one month from such release if such costs are not paid by the defendant. (Laws 1907, ch. 178, § 10; Laws 1887, ch. 165, § 5; Gen. Stat. 1909, §§ 2468, 4378.)

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed May 7, 1910. Affirmed.

*Frank Woodard*, county attorney, and *W. H. Edmundson*, deputy county attorney, for the appellant.

*E. D. Mikesell*, for the appellee.

The opinion of the court was delivered by

SMITH, J.: Mikesell filed his petition in the district court of Wilson county, in which he alleged the formal facts requisite and, in substance, further alleged that in August, 1905, at which time he was the legally appointed, duly qualified and acting assistant attorney-general in and for Wilson county, and was empowered to inform of and prosecute violations against the prohibitory liquor law, he filed in the district court thereof an information charging one George Ellis with having committed fifty-two separate and distinct violations of such law; that thereafter Ellis was regularly tried in that court by a jury, and was found guilty upon each count of the information; that thereupon the court adjudged that Ellis be confined in the county jail for 1566 days and pay fines aggregating \$5200, that he pay the costs of the action, and stand committed to the county jail until the fines and costs were paid; that Ellis was committed to jail pursuant to the judgment; that in June, 1906, the governor of the state pardoned Ellis from the jail sentence and fines, but that Ellis remained in jail on account of the nonpayment of costs assessed against him in the action; that in September, 1907, he was released by the judge of the district court on parole, without being required to pay the costs or give bond for the payment thereof, for the reason that he was insolvent and unable to pay the costs or furnish security for the payment thereof; that in September, 1908, the court granted to Ellis an absolute discharge from custody, without being required to pay the costs or give bond to secure the payment thereof; that as a



---

Mikesell v. Wilson County.

---

part of the costs in the action there was taxed the sum of \$25 on each count on which Ellis was convicted, amounting in all to \$1300, as a fee to the plaintiff as assistant attorney-general for the prosecution of the action; that more than one month had elapsed since Ellis was granted an absolute discharge from custody, and that the fee of \$1300 had not been paid by Ellis, nor by the board of county commissioners of Wilson county, nor by any other person, but remained due and unpaid. Judgment was prayed for in the sum of \$1300, with interest at six per cent from October 1, 1908, and for costs. The petition was verified.

Thereupon the county attorney filed a motion to require the plaintiff to make his petition more specific, definite and certain, in this: (1) To show by what tribunal, court or person the plaintiff was appointed assistant attorney-general as alleged; (2) to show authority to represent the state, and if such authority was general or special; (3) to show a copy of such appointment, give the office, book and page where a record of the appointment could be found; (4) to show a copy of the pardon mentioned in the petition. This motion was by the court denied, and upon the application of the county attorney additional time was given to plead to the petition.

Thereafter the county attorney filed a demurrer to the petition on several grounds, only one of which is argued, namely, that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, for the following reasons: (1) That Ellis was not released from jail in the manner provided in section 4378 of the General Statutes of 1909 (Laws 1887, ch. 165, § 5), and section 253 of the criminal code; (2) that chapter 178 of the Laws of 1907 (Gen. Stat. 1909, ch. 28, art. 5) is unconstitutional and in violation of section 7 of article 1 of the state constitution, which vests the pardoning power in the governor; also in violation of section 10 of article

1 of the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts; also in violation of section 1 of the fourteenth amendment to the constitution of the United States. This demurrer was overruled, and, the defendant declining to plead further, judgment was rendered in favor of the plaintiff for the amount claimed.

As to the motion to make the petition more definite and certain, it required only that the plaintiff plead his evidence and set forth a copy of his written appointment, if any he had. It need hardly be said that the ruling of the court was proper as to each ground. The plaintiff alleged what he claimed to be the facts, in plain and concise language and without repetition, and his cause of action was not based upon his appointment to office. His appointment was merely incidental. Hence it was not requisite to set forth a copy thereof in his petition. His appointment was sufficiently alleged under section 110 of the code of 1909, and was duly verified and could not be controverted in this action, if at all, except by a verified denial. Indeed, it seems that the validity of the appointment could not have been brought in issue by any pleading or motion whatever in this action. In a very analogous case, *In re Gilson, Petitioner*, 34 Kan. 641, referring to the appointment of an assistant attorney-general, it was said:

"If the legality of his appointment is to be inquired into, other proceedings must be instituted. The title to his office can not be determined in this case." (Page 644.)

(See, also, *The State v. Bowles*, 70 Kan. 821; *The State v. Williams*, 61 Kan. 739, 741.)

The statute expressly authorizes the appointment of an assistant attorney-general for the prosecution of cases in violation of the prohibitory liquor law. The plaintiff assumed to act as such assistant attorney-general in the prosecution of this case. The court rec-

ognized him as such officer, and for the purposes of this case this is sufficient.

We pass to the consideration of the demurrer. It is insisted that the parole law (Laws 1907, ch. 178; Gen. Stat. 1909, ch. 28, art. 5) has no application to this case, for the reason that by the title of the act and its provisions it applied only to "persons convicted of a violation of the criminal laws of this state," and it is thereby evident that it was intended to apply only to persons sentenced to fine and imprisonment; that at the time the district court undertook to parole Ellis he had been pardoned by the governor of the state, and that such pardon had relieved him of the jail sentence imposed upon him by the court.

It may be conceded that the pardon of the governor had relieved Ellis of the fine and jail sentence imposed upon him by the judgment, but such pardon did not and could not discharge him from jail for the nonpayment of costs. (*In re Boyd, Petitioner*, 34 Kan. 570.) He was still lawfully confined in jail, and he was confined by reason of being convicted of a violation of the criminal laws of the state, not confined as a punishment, but merely as "a means of enforcing the legal obligation resting upon the defendant to pay the costs which he by his original wrongful act and his subsequent acts has caused to be made, and which have accrued in the prosecution subsequent to the act for which he is punished, and have accrued, not to the public merely, but to individuals, and are given to such individuals as *compensation for their services performed in the prosecution.*" (*In re Boyd, Petitioner*, supra, syllabus.) The judgment for costs against him and the order that he be confined in the county jail until such costs should be paid are necessary incidents of his conviction. It is a statutory requirement that such judgment and order be made upon the conviction of a person for a violation of the laws of the state.

Prior to the enactment of the parole law the county commissioners only had power to discharge the convicted person confined in jail for the nonpayment of costs, but the terms of the parole law, as well as the title, clearly confer this authority upon the district and common pleas courts of the state.

In the appellant's brief much stress is laid upon the expression used in the syllabus in *In re Ellis*, 76 Kan. 368, that "the board of county commissioners alone has authority to order the release of a prisoner committed to the county jail for a failure to pay a fine and costs." This decision, it is true, was rendered two or three months after the parole law took effect. But no question was pending in that case under the parole law, and the attention of the court was not therein called to the fact that the parole law had been adopted. The expression was purely *obiter dictum* in that case, and is not to be regarded in any sense as a construction of the parole law. The application of the parole law being now directly involved, it is held applicable to this case—that is, this law authorizes the courts designated therein to parole persons convicted of a violation of the criminal laws of the state, sentenced to pay a fine and to a term of imprisonment in the county jail and adjudged to pay the costs and to be confined in the jail until the fine and costs are paid, even after a full pardon has been granted by the governor, so far as it is within his power to pardon the convicted person, and the convicted person is held in jail for the nonpayment of costs only.

Ellis was convicted and sentenced before the enactment of the parole law, and it is contended that that law, so far as it attempts to affect the liability of Wilson county for costs growing out of the prosecution of Ellis, violates article 1 of the fourteenth amendment to the constitution of the United States, is retrospective, null and void; that it attempts to create and impose

---

Mikesell v. Wilson County.

---

on Wilson county a liability that did not exist at the time of the arrest and conviction of Ellis. The parole law, so far as it affects this case, is simply remedial. At the time of the conviction of Ellis, Wilson county was morally bound at least to pay the costs of his prosecution, if they could not be recovered from him. This moral obligation by the then existing law would become a legal obligation whenever the commissioners of the county saw fit to discharge him, if, as is presumable, he should remain unable to discharge the obligation himself. If he should not become able to pay the costs, it is not to be presumed that the county commissioners of the county would keep him in the jail for his whole lifetime because he did not do what he was unable to do. Upon the enactment of the parole law, and the discharge of Ellis by the district court thereunder, the moral obligation of the county became a legal obligation. The law is not invalid for the reason that it is retrospective or in violation of the constitution of the state or of the United States. (*Comm'rs of Sedgwick Co. v. Bunker*, 16 Kan. 498; *Board of Education v. The State*, 64 Kan. 6.)

Authority has existed in the boards of county commissioners to discharge from jail persons confined therein for nonpayment of fines and costs ever since 1862. The parole law also authorized certain courts to make such discharge after six months' parole. Such discharge is in no sense a pardon of the crime, nor does it discharge the obligation of the prisoner to pay the costs, but on the contrary expressly provides for the collection of the costs by execution.

It is contended that this action can not be sustained for the reason that the act fixes no time when the claim for costs shall accrue. When the person discharged is found unable to pay or secure the payment of costs, the provision is that "the costs shall be paid by the state or county as in other cases." (Laws 1907, ch. 178, § 10; Gen. Stat. 1909, § 2468.) Plainly this:

---

Sheppard v. Storage Co.

---

means other cases provided by law, namely, the provisions compiled in section 4378 of the General Statutes of 1909 (Laws 1887, ch. 165, § 5) and section 253 of the criminal code.

The petition states a cause of action, and upon the overruling of the demurrer thereto, and the refusal of the defendant to plead, judgment against the defendant followed as a matter of course, without evidence. We find no error in the proceedings, and the judgment is affirmed.

---

L. H. SHEPPARD, *Appellee*, v. THE WICHITA ICE AND  
COLD STORAGE COMPANY, *Appellant*.

No. 18,538.

SYLLABUS BY THE COURT.

1. PRACTICE, SUPREME COURT—*Verdict and Evidence—Judicial Notice—Physical Facts Demonstrating that Evidence is False.* Where there is some evidence tending to support a verdict, to justify an appellate court in overturning it on the ground that it is contradicted by the settled and unquestioned laws of nature or by some established principle of mathematics, mechanics, physics or the like, the undisputed physical facts must demonstrate beyond any reasonable doubt that the evidence is false and that the verdict is without support in fact or law.
2. PERSONAL INJURIES—*Verdict and Evidence.* The evidence in this case examined, and *held*, that the physical facts are not shown to be such as to authorize the court to say that the story told by the plaintiff's witnesses is false or untrue.

Appeal from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed May 7, 1910. Affirmed.

*W. E. Stanley, R. R. Vermilion, and Earle W. Evans,*  
for the appellant.

*C. T. Ferguson,* for the appellee.

---

The opinion of the court was delivered by

PORTER, J.: The plaintiff sued to recover damages for injuries caused by his falling into an open tank of hot water while in the defendant's employ. The jury awarded him damages in the sum of \$2000. The defendant appeals.

The defense was contributory negligence. The plaintiff had been in the employ of the defendant five and one-half days. He had only been at work in and about the room where the accident occurred half a day. The room was undergoing repairs, and the floor was being taken up and the plaintiff was engaged in carrying out the lumber. The defendant sought to show that the room was so light that the plaintiff should have seen the tank before he stepped into it. The evidence shows that there were two skylights in the roof over the room, each six feet long and three feet wide; that there were several doors and windows, including two windows in the north about eighteen or twenty feet away, and an opening in the north wall seven feet by four feet, distant about twelve feet from the tank. In addition, the floor between the opening and the tank had been taken up. The plaintiff testified that at the time of the accident he was looking on the floor for a pinch bar, and was feeling along with one hand trying to find it; that it was so dark where he was that he did not see the tank and walked into it. He also testified that a pile of lumber on the floor obstructed to some extent the light from a door back of him, and that the skylights were obscured by dirt and smoke. He was corroborated by a witness who was present and testified that it was dark near the tank, from which there was a weak vapor of steam escaping at the time. There was also testimony that another tank, called the "brine tank," had been raised about four feet from the floor on account of the repairs which were being made, and that this tended to shut off a part at least of the light from the windows and openings.

There is only one proposition argued in the brief, which is, that the testimony of the plaintiff's witnesses is not to be credited or given any weight whatever because of the physical facts; that the size of the room and the number of doors and openings from which light was admitted being conceded, it is physically impossible that the testimony of the plaintiff's witnesses can be true.

It is said in the defendant's brief that "before this verdict can be sustained this court must feel satisfied that, notwithstanding all the windows and openings, it was so dark about the vat that the plaintiff could not see his danger." We do not so understand the law or the functions and authority of the court. We may have grave doubts whether it was so dark about the vat as to prevent the plaintiff from seeing his danger. The jury have said that it was. The question for us to determine is whether there is legal evidence in the record to support this finding. The defendant urges that in order to sustain the verdict the court would be required to ignore the evidence of its own senses and its own experience in like matters. The question is squarely presented, therefore, whether the physical facts in this case are such that we can say there is no legal evidence to support the verdict. A similar contention was raised in the "wool case" (*Insurance Office v. Woolen-mill Co.*, 72 Kan. 41), where the court declined to disturb the verdict of a jury far more at variance with the undisputed facts and well-known laws of nature than is the verdict here. It was urged again, but unsuccessfully, upon another state of facts and circumstances in the recent case of *Smith v. Railway Co.*, ante, p. 136.

Appellate courts do not hesitate to reverse a judgment where a principle of law judicially known to the court requires it, notwithstanding the trial court may not have taken judicial notice thereof. It is equally clear that appellate courts will take judicial notice of the unquestioned laws of nature, of the laws of mathe-



---

Sheppard v. Storage Co.

---

matics and of physics; and where the trial court has refused to recognize them, and has approved a verdict supported by some evidence, but so far at variance with the undisputed physical facts as to demonstrate that the evidence is false and the verdict unjust, it becomes the duty of the appellate court to reverse the judgment. Speaking of the duty of an appellate court in this respect, Mr. Elliott, in his work on Evidence, says:

“Even though it may not be authorized to weigh evidence and pass upon the facts, it may, and should, so use its judicial knowledge as to bring about justice. Thus, there are often undisputed physical facts clearly shown in evidence, and by applying to them a well-known law of nature, of mathematics, or the like, it is demonstrated beyond controversy that the verdict or finding is based upon what is untrue and can not be true. In such cases it is very generally held that the appellate court should take judicial notice of the law of nature or mathematics or quality of matter, or whatever it may be that rules the case, and apply it as the trial court should have done.” (1 Ell. Ev. § 39.)

This principle was recognized by the court in *Young v. Railway Co.*, 57 Kan. 144, where the plaintiff, who was injured at a railroad crossing, testified that when within a distance of a hundred feet from the crossing she looked and listened for the train, and then stopped again and looked and listened, but did not see the train until she was struck. It was held that her testimony was self-contradictory, because if she had looked she must have seen the train, for it was in plain view. Again, upon the same principle, in *Railroad Co. v. Holland*, 60 Kan. 209, a judgment for the plaintiff was reversed with directions to enter judgment for the defendant. That was a crossing case, and the plaintiff testified that she looked and listened but did not see the train. The jury made a finding that she was not negligent. The finding was held to be “little less than absurd” (p. 212), because her evidence was in plain contradiction of the physical facts. The same doctrine

---

Sheppard v. Storage Co.

---

has frequently been recognized and followed by other courts. (*Lake Erie and Western Railroad Company v. Stick*, 143 Ind. 449; *Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607; *Bornscheuer v. Traction Co.*, 198 Pa. St. 332; *Payne v. C. & A. R. R. Co.*, 136 Mo. 562; *Hudson v. R. W. & O. R. R. Co.*, 145 N. Y. 408; *Medcalf v. St. Paul City Ry. Co.*, 82 Minn. 18; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 N. Y. 615.)

In the case last cited the plaintiff, who was a brakeman, was injured by striking his head against an arch of a tunnel. The car upon which he was riding was identified and its height above the rails and the height of the arch in the tunnel established by the plaintiff's evidence, so that it was undisputed that the space between the top of the car and the arch of the tunnel was four feet and seven inches. He testified that at the time he received the injury he was sitting down on the top of the box car. There was a cut or gash on his forehead, and it was undisputed that in order to have received the blow at that point his head must have been at least four feet eight inches above the top of the car. The trial judge submitted to the jury the question of the possibility of the accident happening in this way, saying: "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." (Page 621.) In the opinion it was said:

"Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case.

"The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific or historical character." (Page 621.)

There was no evidence showing the height of the

plaintiff, but the court took judicial notice that the average height of man is less than six feet, that the average length of the body from the lower end of the spine to the top of the head is less than thirty-six inches, and came to the conclusion that a man whose forehead would be four feet seven inches above the seat upon which he was sitting must be at least nine feet high; and, since history affords no instance of man attaining such height, the court took judicial notice of the fact that a man could not strike his head under those circumstances, and reversed the judgment.

In the case at bar the undisputed physical conditions surrounding the plaintiff at the time he received his injuries furnished a strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. Where there is some evidence tending to support a verdict, to justify an appellate court in overturning it on the ground that it is contradicted by the settled and unquestioned laws of nature or by some established principle of mathematics, mechanics, physics or the like, the undisputed physical facts must demonstrate beyond any reasonable doubt that the evidence is false and that the verdict is without support in fact or law. To justify such a conclusion in this case would require information on a number of matters of more or less importance concerning which the record is silent. For instance, we have information as to the number of windows, doors and openings, and their size, but the dimensions of the room are not stated, although the abstract contains a blue print from which, if it be drawn to a scale, we may assume that the building was thirty-two feet square. There are no directions marked on the plat, but, assuming that the top of the map is north, the ice room, which is sixteen feet square, is in the northeast corner of the building. The room in which the accident occurred is sixteen feet east and west by thirty-two feet north and south, with an "L" extension on the south

---

Sheppard v. Storage Co.

---

and east sixteen feet square. There are no windows in the south, one window and one door on the west, and two doors on the east side of the "L" extension. In that part of the room where the dip tank appears to be located the openings are in the north, and consist of two windows and an opening in the wall seven feet by four feet. The plat shows four tanks in addition to the one in which the plaintiff was injured, or two tanks extending across the room; it is impossible to tell which. Nor is it possible to tell from the plat either the location or dimensions of the brine tank, which was raised up about four feet and which the plaintiff claimed obstructed the light. It is stated in the brief that this tank is east of the ice room, with a passage between them, but if we are correct in our assumption as to the directions on the map it would be a physical impossibility for it to be located east of the ice room. Again, we know from the record that the accident occurred just after the noon hour, January 17, but whether it was a bright, clear day or a dark, gloomy one we are not advised. In answer to special questions, the jury found that the doors, windows, skylights and other openings in the room where the hot water vat was located did not admit sufficient light to enable the plaintiff to see it. The vat itself appears to have been in the main room, immediately north of the angle formed by the southwest corner of the ice room. The vat was level with the floor; it was three feet long and twenty inches wide, and there was a slight mist or vapor of steam rising from it. It is reasonable to suppose that the brine tank, which was raised up about four feet, cast some shadow on the floor, just as a table, desk or any solid article of furniture will do in an ordinary room. With no information as to the size or dimensions of this tank, or its location with respect to any particular door or window, we are unable to say that the story told by the plaintiff's witnesses is either improbable or untrue.

The judgment is therefore affirmed.

U. S. WOLFE, *Appellee*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LYON, *Appellant*.

No. 16,539.

## SYLLABUS BY THE COURT.

1. **CLERK OF THE DISTRICT COURT—*Fees and Salary*.** Under the provision of section 3030 of the General Statutes of 1901 (Laws 1899, ch. 141, § 1), a clerk of the district court in a county having a population of more than 20,000 and not more than 30,000 is entitled to receive all the fees of his office charged and collected for services rendered by him, if such fees do not exceed the amount of \$1400 per annum; if they do exceed that amount, then he is entitled to receive one-half of the additional fees charged for services rendered by him.
2. ——— ***Fees Collected by Successor*.** In such a county the clerk retired from office at the expiration of his term. He had received the sum of \$1400 per annum during the time he was in office. He left a large amount of fees charged upon the books of his office for services rendered by him. These fees were collected by his successor from time to time, and paid to the county treasurer. *Held*, that one-half of such fees belong to the retiring clerk and one-half thereof to the county.

Appeal from Lyon district court; FREDERICK A. MECKEL, judge. Opinion filed May 7, 1910. Reversed.

W. C. Harris, and O. S. Samuel, for the appellant.

L. B. Kellogg, W. L. Huggins, and C. M. Kellogg, for the appellee.

The opinion of the court was delivered by

GRAVES, J.: This is an action against the board of county commissioners of Lyon county, commenced by a former clerk of the district court to collect fees claimed to be due him for services rendered while in office, but collected by his successor. The action was tried in the district court of that county, where judgment was rendered in favor of the plaintiff, and the county has appealed to this court.

The plaintiff claims that all back fees collected by his

---

Wolfe v. Lyon County.

---

successor belong to him, while the county claims that he is entitled to only one-half thereof. The question involves an interpretation of the statute relating to fees and salaries, being section 3030 of the General Statutes of 1901 (Laws 1899, ch. 141, § 1), which reads:

"The clerk of the district court in the respective counties of this state shall charge, as full compensation for their services as required by law to be performed by clerks of the district court, the fees as hereinafter provided:

For filing each paper, five cents.....	\$0.05
Docketing each action on appearance docket, or execution docket, each, fifteen cents.....	.15

[Here follows a list of the specific fees the clerk is allowed to charge and collect.]

"Provided, further, that the clerk of the district court in counties having the following population may retain all fees collected as hereinafter specified: . . . In counties having a population of more than 25,000 and not more than 30,000, per annum, \$1400; . . . and if in any year the fees collected shall be more than the sums above specified . . . the said district clerks shall pay to the county treasurer . . . one-half of such excess, when collected, taking duplicate receipts therefor, one of which they shall file with the county clerk; and such money shall become part of the general fund of the county."

It is conceded that the population of Lyon county is such that this statute applies to it. The money in controversy represents the fees earned by the plaintiff while he was in office and by him charged upon the books of his office. His successor in office collected it and deposited it with the county treasurer; a small sum was paid to the county clerk.

It seems clear that the fees and salary law intended that the clerk should receive all the fees of his office if they did not exceed the sum of \$1400 per annum; and, if they did exceed that sum, that he should receive, in addition to the sum of \$1400 per annum, one-half of all other fees earned by him. The plaintiff received the sum of \$1400 per annum while he was in office, and the

---

Hulsman v. Deal.

---

fees in controversy are in excess of that amount. He is therefore entitled to only one-half of such fees. The remainder belongs to the county.

We are unable to concur in the conclusion reached by the district court. Its judgment is reversed, with direction to divide the fund in controversy between the plaintiff and the county, equally, taxing the costs to the plaintiff.

---

CHARLES B. HULSMAN, *Appellant*, v. JENNIE DEAL,  
*Appellee*.

No. 16,541.

SYLLABUS BY THE COURT.

**TAXATION—Redemption from Tax Sale—Minor—Limitation of Actions.** The right of a person, given by statute, to redeem his land from a sale for taxes during the period of his minority and for one year thereafter is not hindered by the provisions of another statute which requires that a suit to avoid a sale or conveyance for taxes, except in cases where the taxes have been paid or the land redeemed, shall be commenced within five years from the time of recording the tax deed.

Appeal from Finney district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Reversed.

*O. H. Foster, Edgar Foster, and Fred J. Evans*, for the appellant.

*Albert Hoskinson, and R. W. Hoskinson*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: The question to be decided arises upon the right of a person to redeem his real estate from a sale and conveyance for taxes more than five years

---

Hulsman v. Deal.

---

after the tax deed had been recorded, but within one year after attaining the age of twenty-one years.

The plaintiff became the owner of the land on June 30, 1894. He was then a minor. He became twenty-one years of age on October 10, 1906. The defendant claims to own and is in possession of the land under a tax deed dated June 22, 1900, for the delinquent taxes of 1893. On September 24, 1907, the plaintiff tendered to the county treasurer a sufficient sum for the redemption of the land from the tax sale and conveyance, as provided by law. (Laws 1893, ch. 110, § 2; Gen. Stat. 1909, § 9465.) This tender was refused. He filed his petition October 7, 1907, alleging these facts and including other allegations necessary in an action of ejectment. The defendant demurred to the petition. The demurrer was sustained, and the plaintiff appeals. The reason for the decision is thus stated in the judgment:

"And the court . . . sustained said demurrer for the reason that the petition shows upon its face that the tax deed under which the defendant claims has been of record for more than five years prior to the commencement of this action, and for more than five years prior to the making of the tender plead by the plaintiff in this action, and because no action was commenced or tender made prior to the expiration of five years from the recording of the deed."

The plaintiff bases his right to redeem upon the statute providing that "the lands of minors . . . may be redeemed at any time before such minor becomes of age, and during one year thereafter." (Laws 1876, ch. 34, § 128; Gen. Stat. 1909, § 9466.) This case falls clearly within the terms of this statute, but it is claimed that section 141 of the tax law is a limitation upon the minor's right of redemption. This section reads:

"Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law,



shall be commenced within five years from the time of recording the tax deed, and not thereafter." (Laws 1876, ch. 34, § 141; Gen. Stat. 1909, § 9483.)

While these sections must be read together, being parts of the same chapter and relating to the same subject, full effect should be given to the provisions of each, if not inconsistent or contradictory. It will be noticed that from the limitation in the last section quoted cases are excepted where the taxes have been paid or the land redeemed as provided by law. In cases other than those excepted the five-year limitation applies; in the excepted cases it does not. Therefore a minor may redeem his land during his minority and for one year afterward. No conflict is perceived in these provisions.

It is insisted, however, that this court has held otherwise. The cases of *Cartwright v. Korman*, 45 Kan. 515, and *Goodman v. Wilson*, 54 Kan. 709, are cited in support of this contention. In the first of these cases the question related to the redemption of the land of an insane person, and it was held that section 17 of the civil code (Gen. Stat. 1901, § 4445) did not enlarge the five-year limitation provided in the tax law. In the opinion, after quoting section 141 of the tax law, it was said:

"The limitation begins to run immediately upon the recording of the tax deed, and against all persons, except in such cases and against such persons as are expressly excepted from its operation. The only exception provided is where the taxes have been paid or the lots redeemed as provided by law. . . . It has been determined that it [§ 141] is complete in itself, except so far as it is modified by other provisions of the tax law." (Page 517.)

Thus the force of the exceptions was clearly recognized. In *Goodman v. Wilson*, 54 Kan. 709, the opinion discussed the right of minors to redeem from tax sales, and decided that section 141 of the tax law is not modi-

fied or limited by the code provision before referred to. The person in whose right redemption was there sought had become of age more than one year before the suit was commenced. His case was therefore not within the exception of the statute, and the time could not be extended by the two-year period for commencing actions after disability is removed, as provided in the code.

In the argument reference was made to *Douglass v. Lowell*, 55 Kan. 574, but in that decision effect was given to the exception in favor of minors. Language in the opinion not necessary to the decision, which it is claimed imports a different conclusion, has been, it seems, erroneously construed to limit the right of redemption expressly given to minors by the statute.

The plaintiff, having tendered the amount due for taxes within the time allowed therefor, must be considered as having redeemed the land under the provisions of the statute first quoted.

Another contention of the defendant is that the plaintiff, in order to state a cause of action, ought to have alleged that the land was not necessary for the payment of the debts of his parents, through whom he derived title by inheritance. This contention is without merit. The petition stated a cause of action.

The judgment is reversed and the cause remanded, with directions to overrule the demurrer.

---

Hawkins v. Windhorst.

---

MILEY HAWKINS, *Appellant*, v. E. C. WINDHORST,  
*Appellee*.

No. 16,545.

SYLLABUS BY THE COURT.

**NEGOTIABLE INSTRUMENTS** — *Consideration—Mutual Promises—Bank Check Given by a Purchaser—Refusal to Accept Delivery.* The mutual and concurrent promises of parties in the sale and purchase of cattle, wherein a check is given by the purchaser as a partial payment for the cattle sold, constitute sufficient consideration for the check; and when an action is brought by the payee against the drawer on the protested check the drawer can not defend on the ground that no cattle were received by the purchaser, when it appears that the cattle were tendered to him and that the nondelivery of them was due to the failure of the purchaser to perform his part of the agreement.

Appeal from Edwards district court; CHARLES E. LOBDELL, judge. Opinion filed May 7, 1910. Reversed.

*F. Dumont Smith*, and *A. C. Dyer*, for the appellant.  
*G. Polk Cline*, and *W. G. Fairchild*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by Miley Hawkins to recover from E. C. Windhorst the proceeds of a bank check drawn upon her account by her husband, Fred Windhorst. There is testimony to the effect that Fred Windhorst purchased ninety-two head of cattle from Hawkins, and as part payment gave the check in suit to Hawkins; that the cattle were taken to Windhorst's, in accordance with the agreement, but he declined to receive them, and, the check having been received and protested, this action was brought. It appeared in the trial that Fred Windhorst had acted as agent of his wife in business transactions, including the issuance of checks, but to what extent and for what purposes were matters of dispute. The scope of the agency of Fred Windhorst and the means of establish-

---

Hawkins v. Windhorst.

---

ing it were matters of contention at the first trial, and the judgment then rendered was reversed because of rulings rejecting evidence which tended to show that he was the agent of his wife, with authority to sign her name to a check on her account. (*Hawkins v. Windhorst*, 77 Kan. 674.) On the second trial evidence was received tending to show that Fred Windhorst acted for his wife in banking matters, that he deposited money in the bank in her name and drew checks against the account which were sometimes signed "E. C. Windhorst, by Fred Windhorst," and sometimes signed with his name alone. But checks signed either way were accepted by the bank and paid from her deposit and charged to her account. This course of dealing was known to Hawkins at the time the transaction was had and the check delivered to him on the contract. He states that he carried out his part of the agreement on which the check was paid by taking the cattle over to Windhorst and offering to deliver them to him. At the close of the testimony the court instructed the jury, and the following constitutes the entire charge, the last paragraph of which is the subject of complaint:

"For plaintiff to recover in this case he must prove to your satisfaction, by a preponderance of the evidence, that Mr. Fred Windhorst had authority to check on his wife's account for his own transactions; second, that he gave this check in question for a valuable consideration.

"If he has proven both of these facts your verdict should be for the plaintiff, for the sum of the check, with interest at the rate of 6 per cent from its date.

"If you believe from the evidence that the check in question was given as a part of the purchase price of the cattle, which Mr. Windhorst or his wife never received, and that they never actually received anything for the check, then your verdict should be for the defendant."

The contention is that as the cattle were never accepted by the Windhorsts the last paragraph of the in-

---

Hawkins v. Windhorst.

---

struction practically advised the jury to find in favor of the defendant. In effect the jury were instructed that unless the cattle were accepted by the appellee or her husband there was no consideration for the check. It was a written contract, a negotiable instrument, and by virtue of the statute it imports a consideration. (Gen. Stat. 1868, ch. 21, § 7; Laws 1905, ch. 310, § 31; Gen. Stat. 1909, §§ 1644, 5277.) According to some of the testimony the check for \$500 was issued and delivered to appellant in the execution of mutual agreements between the parties. There was testimony that it was issued by one having authority to make contracts and to issue checks upon appellee's bank account. The sale of the cattle, including the giving of the check, resulted in an obligatory contract. Assuming that Fred Windhorst had the authority claimed, and which he appeared to have, the check was a *pro tanto* payment on the cattle purchased. If it was given and taken for that purpose, and without other conditions, it was as much a payment as if a promissory note had been accepted or as if cash had been paid. As between the parties it was a valid instrument when it was given and accepted, because there was not only the presumption of consideration, which arises under the law, but there were the mutual, concurrent promises between the parties, and these constitute a good consideration. It is fundamental that an agreement to do something, as well as mutual promises between parties, affords a sufficient consideration for the giving of commercial paper. (9 Cyc. 323; 1 Par. Notes & Bills, p. 191.) Of course, if appellant, after taking the check, had failed to deliver the cattle for which payment had been made by the check, appellee might have defended against appellant's action on the ground of an entire or partial failure of consideration; but appellee can not by nonperformance on her part destroy the consideration of the check or invalidate the contract. Appellant, it appears, performed his part of the contract, and the

---

Funk v. Insurance Co.

---

other party can not, as we have seen, base a failure of consideration upon his own failure to perform.

For the error in the instruction the judgment is reversed and the cause remanded for a new trial.

---

JOHN D. FUNK, *Appellant*, v. THE SHAWNEE FIRE INSURANCE COMPANY, *Appellee*.

No. 16,547.

SYLLABUS BY THE COURT.

**FIRE INSURANCE**—*Assignment of Policy to a Vendee—Consideration for Policy—Consent of Mortgagee to Assignment.* A mortgage clause in the usual form was attached to a policy insuring the owner of property against loss by fire. The owner then assigned the policy, with the assent of the insurer, to a vendee of the property. *Held*, the original premium supported the insurance of the two interests—that of the owner and that of the mortgagee—and the policy was sustained by that consideration in the hands of the assignee. *Held*, further, that since the mortgage clause reserved no right to the mortgagee to approve assignments of the policy the want of such approval did not affect the validity of the policy in the hands of the assignee.

Appeal from Marion district court; ROSWELL L. KING, judge. Opinion filed May 7, 1910. Reversed.

*H. S. Martin*, and *R. Williams*, for the appellant.

*Mulvane & Gault*, and *D. R. Hite*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The Shawnee Fire Insurance Company issued to Nuss, the owner, a policy insuring his farm buildings against fire. A mortgage clause was attached making the loss, if any, payable to the Mutual Benefit Life Insurance Company, mortgagee, as its interest might appear, and providing that upon payment to the

---

Funk v. Insurance Co.

---

mortgagee the mortgage should be assigned to the insurer. Nuss sold the farm and the insured property to Funk, and as a part of the consideration orally agreed to transfer the insurance policy to Funk. The papers incident to the sale were made out for the parties by Fast, who was also the insurance company's agent. The transfer of the policy was specifically called to his attention, and he was directed to make the necessary change. He assured the parties at the time that everything was all right. Afterward Funk inquired of him, "How is it about that insurance on my property? Are my buildings insured?" Fast replied, "Yes, they are insured." The policy provided that, unless an agreement to the contrary should be indorsed thereon or added thereto, it should be void if change should take place in the title or possession of the property, or if the policy should be assigned before loss. It further provided that no officer or agent of the company had power to waive conditions except by writing indorsed on the policy itself. The policy had been delivered to the mortgagee, remained in the mortgagee's possession, and no written assignment of it was ever made or noted in writing on the instrument. The buildings were burned and the loss was paid to the mortgagee, who assigned the mortgage to the insurance company. Funk tendered to the insurance company the amount of the mortgage, less the amount of the insurance, and demanded a release. The tender was rejected and the demand was refused. Funk then brought an action to cancel the mortgage and to recover statutory damages for the refusal to release. A demurrer was sustained to the plaintiff's evidence, and he appeals.

The usual question is raised respecting policy restrictions upon the authority of officers and agents, but the evidence was sufficient to warrant a finding that Fast was the insurance company itself for all purposes of the transaction in controversy. It follows that the regularity of the assignment of the policy to Funk is not

open to question by the company. With this matter aside, the argument to sustain the demurrer is directed to two propositions: First, there was no consideration to support the policy in the hands of the assignee; and, second, the assignment was invalid without the consent of the mortgagee. Neither one is sound.

The premium supported the insurance of two interests—that of the owner and that of the mortgagee. These interests were so far distinct that the situation may be regarded as if two policies had been issued, one to the owner and one to the mortgagee. But the consideration for both was not absorbed by either one. The mortgage clause did not eliminate the owner or his interest. He could discharge the mortgage and in the event of loss collect all the indemnity. His substantial rights, paid for and protected by the policy during its life, he could assign to his successor in ownership.

The mortgage clause reserved to the mortgagee no right to approve or disapprove assignments of the owner's insurance, although changes in the ownership of the property insured are contemplated by the following language: "And this insurance, as to the interest of the mortgagee only therein, shall not be invalidated . . . by any change in the title or ownership of the property." Without such a reservation the mortgagee could not restrict the owner's right to assign. The mortgage clause further provided that the mortgagee's insurance should not be invalidated by any act or neglect of "the mortgagor, or owner"—that is, any owner, including one in succession to the mortgagor. Consequently the mortgagee could have no interest in who became owner besides the mortgagor. The insurer might well have such an interest, and consequently it reserved the right to approve assignments of the policy by the owner.

The judgment of the district court is reversed, and the cause is remanded for a new trial.



---

Yurann v. Hamilton.

---

JASON YURANN, *Individually and as Trustee, etc.*, Appellant, v. JOHN L. HAMILTON *et ux.*, Appellees.

No. 16,551.

SYLLABUS BY THE COURT.

1. PLEADINGS — *Amendment — Answer Signed after Judgment.* Where a petition is filed in the district court and an answer is filed thereto purporting to be the answer of the defendants, but is entirely unsigned, and the case is set for trial and tried in all respects as if the answer had been signed, and the attention of the court is not called to the failure of the defendants to sign their answer until after judgment, it is not error then to permit the answer to be amended by signing the same.
2. PRACTICE, SUPREME COURT—*Conclusiveness of Findings—Motion for a New Trial.* On a motion for a new trial, based on alleged accident and surprise growing out of an alleged agreement as to a waiver of evidence between the attorneys for the parties, the finding of the court as to the existence of such agreement, made upon conflicting affidavits, and the denial of the motion in accordance with such finding, can not be reviewed here.
3. LANDLORD AND TENANT—*Purchase of Tax Deed by Tenant.* Land in the hands of the receiver of a corporation was sold for delinquent taxes in September, 1900, to F. In May, 1902, F. sold the tax certificate to H. March 1, 1903, H. rented the land of the receiver and took possession of it as tenant. In September, 1903, H. received a tax deed to the land, and thereafter claimed possession and right to the land under the tax deed, but paid his rent according to contract. *Held*, that as such tenant he was under no obligation to pay the taxes and was not estopped from taking the tax deed and holding thereunder.
4. CORPORATIONS—*Receiver—Interference by Creditors Enjoined — Purchaser of Tax Certificate.* By buying the tax certificate H. did not become a creditor of the corporation, and was not barred by an order of the court appointing the receiver which restrained creditors of the corporation from interfering with the property of the corporation.

Appeal from Marshall district court; SAM KIMBLE, judge. Opinion filed May 7, 1910. Affirmed.

---

Yurann v. Hamilton.

---

*W. S. Glass, and W. W. Redmond, for the appellant;  
J. G. Strong, of counsel.*

*E. A. Berry, for the appellees.*

The opinion of the court was delivered by

SMITH, J.: In 1899, and for some time prior and subsequent thereto, the Blue Rapids Company, a corporation, owned the 40-acre tract of land which is in dispute, and which is located in Marshall county, Kansas. The taxes levied against the land for 1899 were not paid. Litigation having been commenced between certain of the stockholders of the corporation and the corporation itself in the district court of that county, the court, in March, 1900, appointed one Russell receiver of all the real and personal property of the corporation. Russell was succeeded as receiver in February, 1901, by one Winter. At the tax sale in 1900 the land was sold for the taxes of 1899 to one Frazier, and in May, 1902, Frazier assigned the tax certificate to J. L. Hamilton. In March, 1903, Hamilton leased the land from the receiver, Winter, under a verbal lease for one year, and took possession of the same. September 12, 1903, the county clerk issued and delivered to Hamilton a tax deed to the land, which was filed for record on the same day. Some time after the issuance of the tax deed Hamilton paid the receiver the rent of the land for one year, and thereafter held possession of the land under the claim of ownership, refusing to rereat at the close of the year, but continuing in possession thereof until the trial of this action.

The plaintiff, Yurann, was a stockholder in the Blue Rapids Company, and as a result of the litigation in the company the land in question was by decree or otherwise conveyed to Yurann, as an individual and as trustee for six other stockholders of the corporation. In August, 1908, Yurann, for himself and as trustee, as aforesaid, began this action against Hamilton and wife by filing a petition in the district court of Marshall

---

Yurann v. Hamilton.

---

county to set aside the tax deed issued to Hamilton. In due time Hamilton filed an answer thereto, which for some reason was not signed by himself or by his attorney.

In addition to disclosing the facts heretofore recited, it appeared that the order of the court directing the receiver to take charge of the real and personal property of the corporation contained the following:

"All creditors of said Blue Rapids Company are hereby enjoined from in any way intermeddling with the property hereby directed to be turned over to said receiver, and all officers, directors, agents and tenants of said Blue Rapids Company are hereby enjoined from interfering with or disposing of said property of said company, and described herein, in any way except to transfer, convey and turn over the same to said receiver."

The case was tried at the October, 1908, term of the court, and resulted in a judgment in favor of the defendants.

The plaintiff, in the progress of the trial, offered numerous objections to the introduction of evidence by the defendants, but no objection appears to have been made on the ground that no answer had been filed. The case was tried as if at issue. In due time after the judgment was rendered the plaintiff filed a motion for a new trial on the statutory grounds, and also set forth that the cause was in default, no answer having been filed therein, and alleged error in permitting the defendants to introduce testimony without the filing of an answer. Thereupon, upon the application of the defendants, the court allowed the answer to be signed by their attorney.

In the motion for a new trial an affidavit was introduced on the part of the plaintiff tending to show a verbal agreement between the attorneys of the parties in regard to certain evidence, or the submitting of the case without certain evidence, which agreement was said to have been made before the parties announced

themselves ready for trial; and in response thereto the attorney for the defendants asked time to prepare his counter affidavit denying the statements made in the affidavit of the plaintiff, and at the suggestion of the court he stated the substance of his proposed affidavit, which was considered by the court, and he was given leave to reduce it to writing afterward, which was done.

The orders of the court allowing the answer to be signed and allowing the defendants' attorney to make a statement of facts and afterward to reduce the same to writing in an affidavit, and the consideration of the oral statement on the motion for a new trial, are alleged as error. An answer was really filed, lacking the signature of the defendants' attorney, and the case was tried as if it were in fact a valid answer. The order allowing the answer to be signed should have been made as a matter of course. The acceptance of an oral statement on the hearing of the motion was of course irregular; but the statement was afterward reduced to writing, and is certified by the court in the case-made, and that it accords with the oral statement is not questioned. The two affidavits relating to accident and surprise arising out of an agreement between the attorneys presented an issue of fact, which the court decided in favor of the defendants on the conflicting evidence, and we can not say that the court erred in its determination.

It is contended on behalf of the plaintiff that the order of the court, above copied, enjoining all creditors of the corporation from intermeddling with the property of the company turned over to the receiver is decisive of this case; that Hamilton, by purchasing the tax-sale certificate, became a creditor of the company, and that the acceptance of the assignment of the certificate and the tax deed, and holding possession of the land thereunder, were in violation of this order. We can not concur in this view. The tax proceeding was

---

Yurann v. Hamilton.

---

not instituted by Hamilton, but by the state. In fact the corporation had allowed the taxes on the land to become overdue before the appointment of the receiver, and it can not be contended that the state could be enjoined from proceeding to sell the land for unpaid taxes as in other cases. If the state had the right to sell the land for the taxes, Hamilton, or his grantor, Frazier, or any other person, had the right to purchase at the tax sale. The corporation, the plaintiff, or anyone else interested in the land, had a right to redeem it from the tax sale at any time before the issuance of the deed.

Again, it is argued that Hamilton did not take possession of the land under the tax deed, but as tenant of the receiver, and that at the time the tax deed was issued he was indebted to the receiver for rent (which he soon afterward paid) in a sum greater than the amount due upon his tax certificate; and inferentially it is claimed that he should have paid the amount due to himself on the tax certificate and accounted to the receiver only for the balance of rent due. This also is untenable. Neither his contract with the receiver nor his relation to any of the parties interested in the land imposed upon him the duty to pay the taxes; and a tenant who is under no obligation to pay taxes may purchase the leased premises sold for taxes and assert his title thus acquired against his landlord in defense of a claim for rent. (*Weichselbaum v. Curlett*, 20 Kan. 709; *Smith v. Newman*, 62 Kan. 318.) It must also be borne in mind that neither the accruing of the taxes nor the sale of the land for taxes was during the time that Hamilton was the tenant of the receiver on the land. The taxes accrued in 1899; the tax sale was in September, 1900, to Frazier, and Frazier sold the tax certificate to Hamilton in 1902. Hamilton became tenant of the receiver March 1, 1903.

We are unable to see that either the case of *Railway Co. v. Love*, 61 Kan. 433, 437, or that of *Cramer v.*

---

The State v. Dolley.

---

ler, 63 Kan. 579, 583, is relevant to the questions here involved. The right of Hamilton to acquire the land by tax deed and the two questions of practice—the allowing of the amendment to the answer and the denying of the motion for a new trial—are the only questions presented in the case. No attack is made upon the validity of the tax deed, as such.

As we find no error in the three questions raised, the judgment is affirmed.

---

THE STATE OF KANSAS, *ex rel. Fred S. Jackson, as Attorney-general, Plaintiff*, v. J. N. DOLLEY, *as Bank Commissioner, etc., et al., Defendants*.

No. 16,626.

SYLLABUS BY THE COURT.

1. **MANDAMUS**—*Parties Defendant*. In mandamus it is proper to make persons defendants from whom the performance of no duty is sought, but who might be affected by the judgment.
2. ——— *Process*. The character of notice to be served upon such defendants is immaterial, so that they are informed of the pendency of the proceeding.
3. ——— *Performance of Official Duty—Parties*. When the individual to be benefited requests a public officer to perform a statutory duty, and is met with a refusal, the state is a proper plaintiff in mandamus proceedings to compel its performance.
4. **STATUTORY CONSTRUCTION**—*Concrete Controversy Necessary*. A court will undertake to pass upon the validity and effect of a statute only when necessary to the determination of an actual and concrete controversy.
5. **JURISDICTION**—*Fictitious Suit—Validity of a Statute*. Where a request is made of a public officer to perform an act under a statute, and he, although believing that the law requires its performance, refuses because of a doubt on the subject, and because he wishes the question to be quickly and finally settled by the decision of a court, a proceeding brought by the state to compel such action on his part is not fictitious.

---

The State v. Dolley.

---

Original proceeding in mandamus. Opinion filed May 7, 1910. Order concerning pleadings.

*Fred S. Jackson*, attorney-general, for the plaintiff.

*B. P. Waggener*, *Chester I. Long*, *J. W. Gleed*, and *John L. Hunt*, for the defendants.

The opinion of the court was delivered by

MASON, J.: The state on the relation of the attorney-general began proceedings in mandamus against the bank commissioner and the state treasurer, alleging that they had denied to national banks the privilege of participating in the benefits of the act (Laws 1909, ch. 61; Gen. Stat. 1909, §§ 537-552) providing for the creation of a depositors' guaranty fund, and asking an order requiring them to recognize such right. The bank commissioner filed an answer stating that upon the strength of an opinion of the comptroller of the currency, to the effect that national banks could not take part in such guaranty fund, he had refused to allow them any participation therein, and asserting as a reason why he should not be required to do so that the part of the act relating to national banks is void. A large number of national and state banks were made parties defendant. Some of them filed a plea in abatement, asking that the action be dismissed on the ground that no real controversy exists between the plaintiff, represented by the attorney-general, and the defendants against whom the writ is asked. The state moved that this plea be stricken from the files, and this motion has been argued and submitted for decision.

While strictly speaking nothing is now before the court for action excepting the motion to strike the plea in abatement from the files, various other matters were incidentally discussed at the hearing, and it seems desirable at this time, so far as possible, to settle all questions of practice, so as to facilitate a final decision.

Doubts have been suggested concerning the pro-

priety of making the banks defendants, and concerning the character of process to be served upon them, the matters upon which they are to be heard, and the manner of the hearing. The practice in mandamus is well settled to make persons defendants of whom the performance of no duty is asked, but who have an interest in the subject matter. (26 Cyc. 415.)

"Technically, in mandamus the only necessary parties are the plaintiff, who asserts the right to have an act done, and the defendant, upon whom the public duty rests to perform it. The practice is common and commendable to bring in other persons who are likely to be injuriously affected by the judgment, in order that they may have an opportunity to be heard in their own behalf, and in a proper case the court will suspend proceedings until this is done. (*Livingston v. McCarthy*, 41 Kan. 20.)" (*The State v. Railway Co.*, 81 Kan. 430, 435.)

How such defendants shall be brought into court can not be of any real consequence. The service of a writ of mandamus upon them seems inappropriate. A rule to show cause why a peremptory writ should not be issued may be proper, but any method of notifying them of the pendency of the action should be deemed sufficient, since they are brought in for their own protection.

The plaintiff's pleading also contains allegations regarding the conduct of these additional defendants, but as they do not constitute a cause of action, and are obviously inserted as the basis for an application for an ancillary order, and such application has not been presented to the court, they are immaterial, presenting no issue and requiring no answer.

The bank commissioner in his answer raises no issue of fact, but seeks to present a question as to the effect of the statute. The language of the writ is indefinite, but by a liberal interpretation it perhaps alleges inferentially that national banks have asked the commissioner to take some action under the bank guaranty law looking to their becoming guaranteed banks, and that he has



---

The State v. Dolley.

---

refused. If that is the case, and if the law makes it the duty of the commissioner to perform the act demanded, a proceeding to require its performance may be brought by the state, since it has an interest in seeing that the will of the legislature is not disregarded by public officers. (*The State v. Lawrence*, 80 Kan. 707.) If the banks that have been made parties contend that upon the face of the papers no peremptory writ ought to issue, their contention can be heard without their filing any pleading. If they maintain that any of the allegations in the writ or answer are untrue, or that other facts exist that are material to the controversy, it is proper that they should file a written statement of such matters. The name by which such statement is designated is immaterial. The only formal pleadings in mandamus are the alternative writ and answer, but there can be no objection to others if they will serve to define the controversy. We think it inexpedient to have a separate trial of the questions sought to be presented by the plea in abatement. The cause has already been set for final hearing in June. If the defendant banks so desire, they may be heard then upon the pleadings already filed. If they wish to present at that time other matters, they may file a statement thereof prior to May 15.

The claim presented by the plea in abatement is that no decision should be made involving an interpretation of the bank guaranty statute, because the proceeding is collusive. It will doubtless simplify matters for the court to express its views as to how far the attitude of the parties toward each other is a matter for inquiry. Of course the court can not undertake to interpret a statute because doubts exist as to its meaning, in advance of a situation having arisen requiring action thereunder. In order for judicial power to be exercised with regard to the statute there must be an actual and concrete controversy regarding it—a definite act demanded under it on the one hand and refused on the

---

The State v. Dolley.

---

other. But if these conditions exist the fact that the demand or the refusal, or both, may have been prompted by a purpose to make what is called a "test case" does not defeat jurisdiction. It is not uncommon or objectionable for an officer to refuse to act upon a doubtful construction of a statute, irrespective of his own judgment as to its true meaning, in order that the question may be speedily and finally settled in the courts. An action brought for that purpose under such circumstances is not fictitious, though it may in a sense be "friendly." (9 Encyc. Pl. & Pr. 720.)

"A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination, simply because his motive in the assertion of such right is to secure such determination." (*Adams v. Union Railroad Co.*, 21 R. I. 134, 140.)

"It is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, can not have any practical legal effect upon a then existing controversy. . . . When there is an actual, *bona fide* contest as to a legal right, an agreement to put the case, when made, by actual exercise of the right and resistance to it, in such shape that the right can be readily determined by the court, especially when the dispute concerns a matter of public moment, which should be speedily settled, has never been condemned by the courts. It is a common, everyday practice in every state of the Union. The noted *Legal Tender Cases* were made up in that way." (*Ex parte Steele*, 162 Fed. 694, 701.)

If a resolution of the directors of a national bank asking that it become a guaranteed bank under the state law has been tendered to the commissioner for his action, and he has refused to receive it, a justiciable con-

---

The State v. Dolley.

---

troversy has arisen, notwithstanding he may believe that the attorney-general's interpretation of the law is correct, and may desire that the court so declare. The statute is valid or it is invalid. It imposes an official duty or it does not. The personal belief or wish of the officer can not affect the matter one way or the other. If there is reasonable ground for a difference of opinion as to whether he should act, his refusal to do so until the question is judicially determined can not be regarded as collusive or capricious. The fact that here the plaintiff has joined as defendants all persons supposed to have an interest in defeating its contention precludes any suggestion of a purpose to mislead the court into making a ruling without both sides of the question having been fairly presented.

Pleadings have been filed other than those referred to, but they present nothing requiring action at this time. The plea in abatement will not be stricken from the files, since it may be regarded as in effect an answer; but it will not be treated as a preliminary matter, and the court will not try any issue it presents in advance of the final hearing. The parties filing it may at their election stand upon the matters there presented, or add anything further they may desire. The plea includes an allegation that no national bank has ever applied for admission to the benefit of the bank depositors' guaranty fund, or of the act in relation thereto, and no additional pleading is necessary to present the issue of fact in that regard.

As has already been said, in a mandamus proceeding defendants of whom the performance of no duty is asked are brought in that they may have opportunity to show that the act demanded would be prejudicial to their rights and ought not to be performed. In the present case the allegations of the alternative writ concerning the conduct of the defendant banks, having relation only to an interlocutory order which has not been asked, will be considered abandoned, and these defend-

ants are now in court only to give them opportunity, if they so desire, to show reasons why no writ should issue against the bank commissioner. If they do not care to contest this matter they may refrain from further appearance herein, with the assurance that they will not be held for any costs and that no judgment will be rendered against them, unless an adjudication of the issue between the plaintiff and the bank commissioner may be regarded as of that character.

W. B. SMITH *et al.*, *Appellants*, v. THE UNITED STATES SUGAR AND LAND COMPANY AND THE HAYS LAND AND INVESTMENT COMPANY, *Appellees*.

No. 16,508.

SYLLABUS BY THE COURT.

1. **AFFIDAVIT**—*Publication Service*. An affidavit for publication service sufficiently complied with the statute to give the court jurisdiction.
2. **JUDGMENTS**—*Validity*. A judgment quieting title held not to be void, although the tax deed upon which it was based was invalid upon its face.
3. ——— *Publication Service—Purchaser in Good Faith—Quitclaim Deed*. One who bought the land in reliance upon such judgment, rendered upon publication service, held to be a purchaser in good faith, although there was a quitclaim deed in his chain of title.
4. ——— *Vacation—Recovery of Value of Land Sold to Innocent Purchaser*. A defendant in a suit to quiet title who was served only by publication and who had the judgment vacated after the land had been sold to an innocent purchaser held to be entitled to a judgment against the plaintiff for its value.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Affirmed.

82	539
82	768

*E. R. Thorpe*, for the appellants.

*Lee Monroe*, and *George A. Kline*, for the Hays Land and Investment Company.

*William Easton Hutchison*, and *C. E. Vance*, for the United States Sugar and Land Company.

The opinion of the court was delivered by

PORTER, J.: The court rightly held the tax deed void. It recites a sale in bulk of three separate tracts of land for a gross consideration. (*Worden v. Cole*, 74 Kan. 226, and cases cited.)

The judgment quieting title in the plaintiffs was not void. The affidavit for service by publication was a sufficient compliance with the statute. It states that the defendants are foreign corporations and that personal service can not be had upon them within the state of Kansas. All the other averments are mere surplusage. The omission of an allegation that such service could not be had "with due diligence" (Civ. Code, § 73; Gen. Stat. 1901, § 4507) has been held immaterial in a similar case. (*Washburn v. Buchanan*, 52 Kan. 417.)

The United States Sugar and Land Company is admitted to be a purchaser in good faith relying upon the judgment quieting title. This admission means what it says, and, therefore, the fact that the immediate grantor of the company held by quitclaim title only does not remove the company from the protection of section 77 of the code. (Gen. Stat. 1901, § 4511.) It is useless to say that the quitclaim in its chain of title was notice of defects in the record title, in the face of the admission that the company purchased in good faith relying upon the judgment. Besides, an examination of the record of the proceedings would not have disclosed that the judgment was void on the ground that the tax deed upon which it rested was void on its face. (*Wagner v. Beadle*, ante, p. 468.)

As the vacation of the judgment could not affect the

---

Prunty v. Light Co.

---

title of the sugar company to the land, it was proper for the court to give judgment in favor of the investment company for the value of the land, less the lien for taxes under the void deed.

The judgment is affirmed.

---

G. R. PRUNTY *et ux.*, Appellees, v. THE CONSOLIDATED FUEL AND LIGHT COMPANY, Appellant.

No. 16,353.

WILLIAM CAUBLE *et ux.*, Appellees, v. THE CONSOLIDATED FUEL AND LIGHT COMPANY, Appellant.

No. 16,355.

**PLEADINGS**—*General Denial.* A denial of every allegation in the petition "prejudicial" or "adverse" to the defendant held not so defective as to present no issue.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed May 7, 1910. Reversed.

*Atwood Cady*, for the appellant.

*B. F. Carter*, and *C. W. Shinn*, for the appellees.

*Per Curiam:* The appellees in each of these cases filed their petition against the appellant for the purpose of canceling in each case an oil-and-gas lease. The appellant filed a demurrer in each case, which was by the court overruled. Thereupon the appellant, in one case, filed an answer in which it denied "each and every allegation in the second amended petition herein that is prejudicial to the rights of the defendant"; and in the other case the appellant filed an answer which denied "each and every allegation in the plaintiffs' petition herein that is adverse to the rights of the defendant." The appellant then filed a motion in each case for a judgment in its favor on the pleadings, and the

---

Prunty v. Light Co.

---

appellees in each case filed a motion for judgment on the pleadings in their favor. After argument the court, in each case, denied the motion of the appellant and sustained the motion of the appellees.

It must be observed that this was not a submission of either case to the decision of the court upon the pleadings, but while each motion called for a judgment upon the pleadings the motions were adversary, each party claiming judgment in his favor; the appellant contending that the petition stated no cause of action against it, and the appellees contending that the answers were a nullity and raised no issue—that the answers denied no fact specifically, but left to the court to determine what was “adverse” and “prejudicial” and to consider such matter traversed.

We have examined the petitions and think the court was right in overruling the demurrer and denying the appellant’s motion for judgment on the pleadings. As to whether the motion of the appellees for judgment on the pleadings was correctly decided depends upon whether the answer in each case was sufficient to put the appellees upon their proof—whether in fact the answer raised any issue.

The general form of a general denial to a petition in this state is that the defendant denies each and every allegation of fact in the petition contained. In *Munn v. Taulman*, 1 Kan. 254, a denial in this form: “denies each and every allegation in plaintiff’s petition alleged against him” (page 254), while not approved as good form, was held sufficient to apprise the plaintiff what defense was intended to be set up in bar of his claim. In Webster’s Universal Dictionary, in the definition of “adverse,” among the synonyms given are, “opposite,” “hurtful,” “unfavorable”; and as synonyms of “prejudicial” are given, “hurtful,” “injurious,” “disadvantageous.”

In so simple a matter as a general denial there is no occasion to depart from the well-recognized form, and

---

LeCompte v. Smith.

---

probably the court could without prejudice have sustained a motion to make these answers more definite and certain; but we do not think the answers were nullities and so defective as to raise no issue, but were sufficient to apprise the appellees what defense was intended to be maintained in bar of their claims.

The judgment, therefore, in each case is reversed, and each case remanded for further proceedings in accordance with these views.

BURCH, J., dissenting.

---

W. T. LECOMPTE, *Appellant*, v. L. V. SMITH, *Appellee*.

No. 16,507.

1. **TAX DEEDS**—*Consideration for which Each Tract Was Conveyed.* A tax deed was not void on its face because it did not sufficiently state the amount for which each of several tracts was conveyed.
2. ——— *Sale to the Best Bidder.* A claim that a tax deed failed to show with certainty that the land was sold to the best bidder at the tax sale not sustained.
3. ——— *Conveyance of Several Tracts—Certificate of Purchase for Each Tract Sold.* The recitals of a deed conveying several tracts were sufficient to show that the treasurer issued a separate certificate of purchase for each tract sold.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Affirmed.

*Lee Monroe*, and *George A. Kline*, for the appellant.

*O. H. Foster*, *Edgar Foster*, and *Fred J. Evans*, for the appellee.

*Per Curiam:* The appellant brought this action to set aside a tax deed issued to the appellee. At the time of bringing the action the tax deed had been of record



---

LeCompte v. Smith.

---

more than five years, and the appellee was in possession of the land. The question involved is whether the tax deed is void upon its face. If valid upon its face, the judgment of the court must be affirmed.

Three objections are made to the validity of the deed. The first is for a failure to state in the deed the amount for which each tract was conveyed. The land in question was sold in four separate tracts. As shown by the face of the deed, the first tract, No. 1, was sold for \$13.20; No. 2, for \$10.86; No. 3, for \$6.76; No. 4, for \$6.92. The aggregate of these amounts is \$37.74, which is the exact consideration recited in the granting clause of the deed for the conveyance.

The deed on its face also undertakes to recite the amount of taxes paid by the purchaser on each tract for the four years following the sale; but this is not a necessary recital, as the payment of subsequent taxes was no part of the consideration for which the deed was made. (*Jones v. Garden City*, 81 Kan. 59.)

The second objection is that the deed fails to show with certainty that the appellee was the best bidder at the tax sale. We think the deed is not open to this objection. It recites:

"And whereas, at the place aforesaid, as they were as aforesaid severally, and in due course, offered for sale, and sold to L. V. Smith, of the county of Finney and state of Kansas, . . . having offered to pay the whole amount of taxes, interest, penalty and costs then due and remaining unpaid on each of the said parcels, tracts and lots of said property hereinbefore described and severally numbered, to wit, on the parcel, tract or lot in said description numbered 1, the sum of thirteen dollars and twenty cents (\$13.20); on that numbered 2, ten dollars and eighty-six cents (\$10.86); on that numbered 3, six dollars and seventy-six cents (\$6.76); on that numbered 4, six dollars and ninety-two cents (\$6.92); for the whole of each of said parcels, tracts and lots respectively, which, as to each of them, was the least quantity bid for, and payment of said several sums, aggregating the sum of thirty-seven dollars and seventy-four cents, having been made by him to the treasurer, the said property was, severally

as aforesaid, struck off to him at the prices aforesaid, and a certificate of purchase issued to him by the treasurer."

The deed shows that the appellee bid the whole amount of taxes, interest, penalty and costs on each tract, which as to each of them was the least quantity bid for. The highest bid that can be received at a tax sale is the entire amount of taxes, interest, penalties and costs, and the only better bid there can be is where someone bids to take a portion of a tract at the entire amount. The tax deed recites that no one offered to take a less quantity of land, hence it appears the land was sold for the highest bid possible, and it is not to be presumed that there were two best bids.

The third objection is that the deed shows affirmatively that the treasurer failed to issue a separate certificate of sale for each tract of land. The recital of the deed is, "the said property was, severally as aforesaid, struck off to him at the prices aforesaid, and a certificate of purchase issued to him by the treasurer." It was the duty of the treasurer to issue a separate certificate for each tract of land sold, although several tracts of land may be embraced in one tax deed, and the recital here is that the tracts were severally struck off to the purchaser and a certificate of purchase issued to him by the treasurer. While this recital refers to the certificate in the singular number, indulging the presumption which should be indulged to support every tax deed which has been of record more than five years we should repeat the word "severally" after "and," making it read, "and severally a certificate of purchase issued to him by the treasurer."

Indulging the presumptions which it has been repeatedly held by this court should be indulged to sustain a tax deed under the provisions of section 141 of chapter 34 of the Laws of 1876 (Gen. Stat. 1909, § 9483), this deed should be held valid on its face, and the judgment is affirmed.

JOHN C. ROLAND, *Appellant*, v. THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, *Appellee*.

No. 18,518.

**RAILROAD BRIDGE—Obstruction of a Stream—Duty to Anticipate Overflow.** A petition held to state a cause of action in virtue of allegations that a railroad in laying its track over a stream and the adjacent lowland negligently omitted to provide an outlet for water that overflowed the banks in times of floods that were to have been anticipated, thereby causing injury to the plaintiff's land.

Appeal from Doniphan district court; WILLIAM I. STUART, judge. Opinion filed May 7, 1910. Reversed.

*S. M. Brewster, and Ryan & Ryan, for the appellant.*  
*J. J. Baker, and R. A. Brown, for the appellee.*

*Per Curiam:* John C. Roland brought an action against the St. Joseph & Grand Island Railway Company to recover damages on account of the flooding of his lands occasioned by its bridge across a stream. His petition was held to be fatally defective, and he appeals. Its allegations, so far as here important, are in substance that the defendant's railroad crosses Wolf river at a point where the waters of that stream occasionally overflow the low ground on each side, the roadbed being upon an embankment some six feet high, measured from the level of such low ground; that "said defendant . . . knew . . . that said stream overflowed as aforesaid and widened out on either side, and that it required, and was necessary, to have an opening of several hundred feet on either side of said Wolf river to carry off the water in time of heavy rains and floods, yet said defendant constructed said roadbed as aforesaid, and as a part thereof constructed a short bridge, not to exceed ninety feet in length, with piling driven in the stream and timbers extending down about thirty inches below the top . . . of said roadbed, entirely insufficient

---

Roland v. Railway Co.

---

to carry off the water at ordinary high-water mark, and insufficient to let the water of said Wolf river pass through or under said roadbed; that said embankment, roadbed and bridge were so constructed as aforesaid that the same formed . . . a dam and obstruction to the water of said Wolf river and the overflow water of the low ground on either side thereof; that the said roadbed, bridge and railroad were so constructed . . . negligently, carelessly and willfully, with the full knowledge that the same would dam up the water of Wolf river and the overflow water therefrom in times of high water and floods and damage plaintiff's lands and crops."

The defendant claims that the petition shows that the water, the obstruction of which is alleged to have caused the plaintiff's injury, had overflowed the banks of the stream and was therefore surface water, which could be obstructed without occasioning liability. The allegation is that the embankment and bridge operated as a dam to the water of the river as well as to the overflow, so that the contention, if otherwise good, would not apply to the entire pleading. The record, however, fairly presents the question whether the obligation of a railroad company in laying its track over a stream and the adjacent low ground is merely to allow room for the passage of so much water as can be carried within the banks. This question has already been answered in the negative in *Manufacturing Co. v. Bridge Co.*, 81 Kan. 616, and upon the authority of that case the judgment must be reversed.

A. J. HUGHES, *Appellee*, v. JOHN DELAUTRE, *Appellant*.

No. 16,521.

EJECTMENT—*Demurrer to Evidence*. In an action of ejectment a demurrer to the defendant's evidence was improperly sustained.

Appeal from Seward district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Reversed.

*Thomas A. Scates*, and *Albert Watkins*, for the appellant.

*J. P. McLaughlin*, and *C. G. Messerley*, for the appellee.

*Per Curiam*: This action was brought to recover two lots in Liberal. In 1901 the lots were owned by Hughes and his son-in-law, Naylor. Naylor gave a mortgage on his half to Beasley for \$421. There is testimony that afterward, and before March 2, 1902, Hughes sold his half interest to Naylor. On that date Naylor sold the property to McMains, who gave a new mortgage on the whole to Beasley for \$668.85. The mortgage covered \$191.45 of debt belonging to Naylor, and this interest Naylor assigned to Hughes, who collected the money in August, 1903. When Naylor sold the property to McMains he surrendered possession of the same. In December, 1902, McMains sold the property to Delautre and Blake, and soon afterward Blake conveyed his interest to Delautre. Since that time Delautre has been in continuous possession of the property. The deeds from Hughes to Naylor and later from Naylor to McMains were not recorded, and it is claimed that they were lost. In 1908 Hughes obtained a warranty deed to the lots from Naylor and a quitclaim deed from McMains, and then brought this action. On the trial Hughes produced an abstract which it was admitted

---

Hughes v. Delautre.

---

showed the state of the record and the record title to the lots to be in Hughes. Delautre then offered evidence tending to show that Hughes had sold his interest to Naylor; of the sale of the property by Naylor to McMains, and of the mortgages mentioned; some evidence tending to show knowledge by Hughes of the transfers and the mortgage which purported to cover the whole property, as well as admissions and statements of his that he had formerly parted with his interest in the property, and also proof that Delautre had been in possession of the property for about five years and had paid the taxes on it, except for one year. The court sustained a demurrer to Delautre's evidence and gave judgment for Hughes. This was error.

While the legal title appeared to be in Hughes, there was evidence tending to show that Delautre was the equitable owner of at least one-half of the property and entitled to the possession of the same. The testimony tends to show that Hughes knew of all these transactions and transfers. If Naylor had not conveyed the lots to Hughes he could hardly have claimed ownership as against Delautre because his deed to McMains was not recorded, and from some of the testimony it appears that Hughes is in no better position, at least as to the half interest formerly owned by Naylor. He is bound to know that Delautre had been in possession of the property, paying taxes and claiming ownership for years before the transfer from Naylor to himself, and must be held to know what an inquiry would have disclosed. The testimony of appellant can not be ignored. It tended to show an interest and right of possession in himself, and a demurrer to his evidence should not have been sustained.

The judgment is reversed and the cause remanded for a new trial.

THE WAKEENEY LAND AND INVESTMENT COMPANY,  
*Appellee*, v. GEORGE H. ANDREW *et al.*, *Appellants*.

No. 16,536.

**COMPROMISE TAX DEED**—*Consideration for Each of Several Tracts.* A compromise tax deed held good on its face after five years, although it showed one year's tax on several disconnected tracts was paid after the certificate issued, without reciting how much of the amount accrued on each tract, the presumption being that the proportion shown by the original sale continued.

Appeal from Greeley district court; CHARLES E. LOBDELL, judge. Opinion filed May 7, 1910. Reversed.

*D. R. Beckstrom*, for the appellants.

*W. M. Glenn*, *Lee Monroe*, and *George A. Kline*, for the appellee.

*Per Curiam:* The sole question presented in this case is whether a five-year-old compromise tax deed, which was held to be void upon its face for a failure to recite how much of the total consideration was applied to each of the several separate tracts conveyed, can be validated by a presumption to be drawn from the other recitals. In *Gibson v. Kueffer*, 69 Kan. 534, the court decided that the statute required a tax deed covering several separate tracts to show, not only how much each was originally sold for, but also for how much it was conveyed. The deed there involved was held invalid because the amounts paid for subsequent taxes were stated merely in gross, but whether these amounts could have been apportioned upon any presumption to be derived from other parts of the deed was not considered. In *Nagle v. Tieperman*, 74 Kan. 53, a somewhat similar deed was involved, but there the taxes upon the several tracts happened to have originally been equal, and the suggestion naturally arose out of that situation that in the absence of anything to indi-

---

Doty v. Bitner.

---

cate the contrary the presumption would be that the equality continued. In *Kessler v. Polkosky*, 81 Kan. 69, although the amounts for which the tracts were sold were unequal, it was held that upon the presumption of continuity the subsequent taxes should be deemed to have accrued against each in the same proportion. In *Van Hall v. Goertz*, ante, p. 142, the principle was applied to a compromise tax deed.

Here the deed states the amount for which each tract was originally sold, and also the amount for which the taxes against it were compromised. It does not recite, however, what part of an amount which was paid as subsequent taxes for one year accrued against each tract. In accordance with the cases cited it will be presumed that the total payment on this account was distributed in the proportion indicated by the original selling prices. That the amounts fixed by the compromise did not bear the same relation to each other will not alter the presumption.

The judgment is reversed and the cause remanded for further proceedings in accordance herewith.

---

DENNIS D. DOTY, *Appellant*, v. J. W. BITNER, *Appellee*.

No. 16,550.

82	551
82	332
82	304

**QUITCLAIM DEED—Consideration—Prior Unrecorded Deed.** The holder of a quitclaim deed who failed to show that he paid a valuable consideration therefor held to have no standing to claim a benefit from the failure of a prior grantee of the same grantor to record his conveyance.

Appeal from Stanton district court; WILLIAM H. THOMPSON, judge. Opinion filed May 7, 1910. Affirmed.



---

Doty v. Bitner.

---

*R. W. Hoskinson, and Albert Hoskinson, for the appellant.*

*G. Porter Craddock, William Easton Hutchison, and C. E. Vance, for the appellee.*

*Per Curiam:* The defendant in ejectment relied upon a tax deed over five years old and an unrecorded conveyance from the former owner. The plaintiff relied upon a subsequent quitclaim deed from the same grantor. Judgment was rendered for the defendant, and the plaintiff appeals.

The tax deed was defective, particularly in stating as the consideration for the assignment of the certificate what was probably the amount paid at the tax sale. It is somewhat like the deed involved in *Van Buskirk v. Lawrence*, ante, p. 76, but whether sufficiently so to make that case decisive of this need not be determined. The plaintiff claimed under a quitclaim deed from one who had in fact parted with the title. He could take no advantage of the defendant's failure to record the earlier deed from the same grantor unless he was a purchaser for a valuable consideration. (*Grocer Co. v. Alleman*, 81 Kan. 543; *Morris v. Wicks*, 81 Kan. 790.) And the burden of proof in this respect rested on the plaintiff. (*Kruse v. Conklin*, ante, p. 358.) The conveyance to him recited that it was made for one dollar and other valuable considerations, but the recital was not evidence against a stranger. (*King v. Mead*, 60 Kan. 539.) Having failed to show any injury resulting to himself from the omission, he had no standing to complain of the defendant's failure to record the deed from their common grantor.

The judgment is affirmed.

FRANK J. BROWN, *Appellant*, v. J. M. WILKERSON *et al.*,  
*Appellees*.

No. 17,095.

**TEMPORARY INJUNCTION—*Dissolution on Final Hearing—Continuance in Force by Appeal.*** Where a party who obtained a temporary injunction was defeated on the final hearing, the injunction was not continued in force by his appeal.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed May 7, 1910. Appellant's application denied.

*E. A. Austin*, for the appellant.

*James E. Larimer*, for the appellee.

*Per Curiam*: The plaintiff in an injunction suit obtained a temporary injunction and gave a bond. On a final hearing judgment was rendered for the defendant, the preliminary order being set aside. The plaintiff appealed within a time fixed by the court, not exceeding ten days, and claims that by virtue of this appeal his temporary injunction and the bond supporting it remain in force. The statute provides:

"When an order discharging . . . an attachment or temporary injunction shall be made in any case, and the party who obtained such . . . injunction shall appeal from such order to the supreme court, the court or judge granting such order shall, upon application of the appellant, fix the time, not exceeding ten days from the discharge or modification of such attachment or injunction, within which the appeal shall be perfected, and during such time the execution of said order shall be suspended and until the decision of the case upon appeal, if the appeal be taken; and the undertaking given upon the allowance of the attachment shall be and remain in full force until the discharge shall take effect. If the appeal be not taken within the time limited, the order of discharge shall become operative and be carried into effect." (Code 1909, § 595.)

Here the temporary injunction was not vacated until

---

Neef v. Harrell.

---

the hearing on the merits; but assuming that the order of vacation may be treated as a separate ruling preceding the judgment, and that the plaintiff by his appeal has stayed the operation of that ruling, the final judgment itself supersedes the prior proceedings, and until it is stayed by some court or order no injunction is in force.

The appellant's application is denied.

---

MARGARET NEEF, *Appellant*, v. CHARLES W. HARRELL,  
*Appellee*.

No. 16,820.

REDEMPTION—*Foreclosure of Purchase-money Lien*. The right of redemption from a sheriff's sale upon the foreclosure of a purchase-money lien limited to six months instead of eighteen, because one-third of the total price had not been paid. (Code 1909, § 503.)

Appeal from Rawlins district court; WILLIAM H. PRATT, judge. Opinion filed May 19, 1910. Modified.

*J. P. Noble*, for the appellant.

*Per Curiam*: Charles W. Harrell contracted to buy a tract of land of Margaret Neef for \$3600, of which \$1200 was to be cash. He took possession of the land but made no payment, contending that the title was defective. She recovered a decree for specific performance, with a provision that unless within a fixed time he should pay the amount of cash agreed upon and give security for the deferred payment she should have judgment against him for the amount of the agreed price, which should be a lien on the land. This judgment was affirmed on appeal. (*Harrell v. Neef*, 80 Kan. 348.) No payment being made, the land was sold by

---

Neef v. Harrell.

---

the sheriff, September 28, 1909, and the sale was confirmed. The judgment indicated that the sale was to be made subject to the statutory right to redeem, without specifying the time within which it should be exercised. At the confirmation Mrs. Neef contended that as the sale had been made to satisfy a purchase-money lien, and a third of the total price had not been paid, the period of redemption should be limited to six months, and she now appeals from an order fixing it at eighteen months. The appellee has filed no brief, and no reason is apparent why under the statute (Code 1909, § 503), more than six months should have been allowed in which to redeem. That time has already expired, but in order that opportunity may be given for the exercise of the right of redemption after the final judgment in the case the period will be extended until June 15, inclusive. The judgment of the district court is modified, and it is ordered by this court that unless the property is redeemed on or before the date named the sheriff execute a deed to the purchaser.

The decision will be announced at once in order that the defendant may have as early notice as possible of the time when the right of redemption will expire.

THE ROBERT GARRETT LUMBER COMPANY, *Appellee*, v.  
MARY R. LOFTUS, *Appellant*.

No. 16,401.

SYLLABUS BY THE COURT.

1. **MECHANIC'S LIEN—*Married Woman's Real Estate—Material Furnished under Contract with Husband.*** The mechanic's lien law (Code 1909, § 649) allowing a lien on a married woman's real estate for material furnished to her husband under a contract with him and used by him to improve such property does not violate the mandate of the constitution (art. 15, § 6) that married women shall be protected in acquiring and possessing property separate and apart from their husbands, or conflict with the married women's act (Gen. Stat. 1909, § 4872) providing that the separate estate of a married woman shall not be subject to the disposal of her husband or liable for his debts.
2. ——— ***Personal Judgment against Wife Not Authorized.*** The mechanic's lien statute does not authorize a personal judgment against a wife for the price of material furnished to her husband under a contract with him and used by him in improving her property.
3. ——— ***Lien Does Not Extend to Shares of Cotenants Acquired after Lien Attached.*** A mechanic's lien created in the manner stated in paragraph 1 upon a married woman's undivided interest in a tract of real estate does not extend to the shares of her cotenants, and after the lien has been perfected she may purchase and hold such shares unencumbered by it.

Appeal from Leavenworth district court; JAMES H. GILLPATRICK, judge. Opinion filed June 11, 1910. Modified.

*James F. Getty, F. D. Hutchings, and David F. Carson*, for the appellant.

*J. C. Petherbridge, and E. B. Baker*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action in the district court was one to foreclose a mechanic's lien. Mary R. Loftus owned an undivided one-sixth of the lots affected, in fee sim-

ple. Her husband undertook to convert a building standing upon the lots into an ice plant, and the lumber company sold him lumber for that purpose. A lien was duly perfected which correctly stated the interest of the owner. After the suit was commenced an amended petition was filed which stated that while the action was pending Mary R. Loftus acquired the remaining interests in the property and thereby became the owner of all the shares. A personal judgment was rendered against Mary R. Loftus for the amount of the lien, the lien was charged upon the whole property, and a decree of foreclosure was entered. Mary R. Loftus appeals.

Section 649 of the code of 1909, which governs the controversy, reads as follows:

“Any person who shall under contract with the owner of any tract or piece of land, or with a trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement or structure thereon, . . . shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided.”

It will be observed that this statute permits a husband to subject his wife's real estate to a lien for improvements which he erects thereon under his own contract, without her authority, consent or knowledge. An agency in the ordinary sense of that term need not exist. The appellant argues that the statute to this extent contravenes the provisions of the constitution requiring that married women shall be protected in acquiring and possessing property separate and apart from their husbands (art. 15, § 6), and contravenes the statute enacted in obedience to the constitution providing that the separate estate of a married woman shall not be subject to the disposal of her husband or liable for his debts (Gen. Stat. 1868, ch. 62, § 1; Gen. Stat. 1909, § 4872).

The mechanic's lien statute does not permit a husband to dispose of his wife's real estate, or permit her real-estate to be sold for his debts, in the sense of the married women's act. The lien is allowed and the sale is made because of the increment in value to the wife's property consequent upon the improvement. Having received the benefit, her property is charged with the burden. The same equitable purpose is subserved as that accomplished by the occupying claimant act, and no more injustice is likely to result than follows from the enforcement of any remedial statute. In some cases the wife may be ignorant of her husband's conduct, and in rare instances the structure may be a detriment, but generally real estate will not be openly and visibly improved without the owner's acquiescence; and a wife who does not submit may always intercept a lien by prompt action. Actual authority on the part of the husband to act for the wife is easily denied and hard to prove, and the door would be opened to gross fraud if, after material has been furnished or labor performed to the betterment of the wife's property, she could repudiate it. For the purpose of preventing perjury and fraud the statute estops the wife from denying the acceptance and receipt of benefits from an improvement erected on her land by her husband. Viewed from this standpoint no constitutional objection to the law is apparent.

From an instruction given the jury called in the case and from the court's findings of fact it appears that the trial court entertained the view that the statute quoted authorizes a personal judgment against the wife, as well as a lien, whenever material is purchased by her husband, is used in the improvement of her property, and is not paid for. Such is not the law. The statute gives nothing, either expressly or by implication, except the right to a lien. It creates no agency in the husband to bind the wife personally, and no personal obligation exists to pay her husband's debt for material

---

Garrett v. Loftus.

---

he buys and uses on her premises unless by conduct or agreement the wife creates one. Knowledge of her husband's contract with the material man and knowledge that the material is being used for the improvement of her property are not sufficient. She may be willing that the improved property shall be bound and be unwilling to subject the remainder of her estate to liability; and unless she adopts the contract as her own or makes herself responsible for the debt as in other cases no personal judgment can be rendered against her. Otherwise her separate estate would be liable for the payment of her husband's debts. The appellee cites the case of *Bethell v. Lumber Co.*, 39 Kan. 230, to the contrary, wherein the commissioner writing the opinion said:

"Where the husband of the owner of the property purchases material, which the statute provides he may do, the person furnishing the material under such a contract may presume, and he has the right to do so, that it is furnished to the husband of the wife, to be charged to her and upon her property, and has a right to file a lien to secure its payment." (Page 234.)

In that case a husband entered into a contract with his wife to furnish labor and material for the improvement of her property. The contract was performed but some of the material was not paid for, and the lumber company which sold the material perfected a lien therefor. The husband told the agent of the lumber company to go to his wife for the money when wanted and that she would pay him. The wife did make payments to the lumber company when called upon, and on such occasions desired receipts in her own name. The contract between the husband and the wife, however, was not disclosed to the lumber company. The district court rendered judgment sustaining the lien, and also rendered personal judgment against the wife. On appeal the judgment was affirmed. The contest in this court related to the effect of the undisclosed contract



between the husband and the wife upon the right to a lien. The language quoted formed a part of the discussion of that subject, which indeed was the only one considered. The personal judgment against the wife rested upon grounds wholly independent of any supposed statutory liability. The existence of such a liability was not pressed upon the attention of the court, was not necessary to an affirmance of the judgment of the trial court, and was not in fact adjudicated, as the syllabus of the decision clearly shows. The interpolation of the word "her" was purely *obiter*, and the clause in which it occurs should read: "to be charged to and upon her property." This being true, the decision furnishes no authority for the personal judgment against Mrs. Loftus. No independent reason for sustaining the judgment is offered by the appellee, and none is apparent.

Expressions are common in the law books to the effect that a mechanic's lien binds interests in the property subsequently acquired by the person who is the owner within the meaning of the statute. An examination of the authorities shows that, although not so stated in express terms, the principle applies to those cases only in which the after-acquired interest operates to increase or enlarge the estate to which the lien has already attached, as when the holder of a leasehold or of a life estate purchases the fee, or the holder of an equitable estate acquires the legal title, or an encumbrance is removed, or when an estate by curtesy becomes initiate by the birth of a child, or when one without title makes an improvement and then obtains title. But if the acquired interest be distinct and independent, so that it does not merge into the estate already held or inure to the support of such estate, it is not affected by the lien.

Leaving out of account necessary repairs and improvements essential to the preservation of the property, one tenant in common can not by his own contract

alone subject the interests of his cotenants to a mechanic's lien. (*Mellor v. Valentine*, 3 Colo. 260; *Seely v. Neill*, 37 Colo. 198; *Conrad & Ewinger v. Starr*, 50 Iowa, 470, 481; *Woodburn et al. v. Gifford*, 66 Ill. 285; *Leslie and Slack v. Leonard*, 10 Pa. Super. Ct. 548.) Those shares are no more bound than they would be if partition had already taken place, and they may be sold and conveyed as free from lien as if independent tracts held by separate owners were involved. The facts of this case are much stronger. By virtue of the marital relation and the statute the appellant's husband was able to subject his wife's one-sixth interest in the lots to the lien, but no other estate or right or interest existed to which he had the legal power to attach a lien. The one-sixth interest belonging to Mrs. Loftus was a fixed and definite share, entitling her to a specific quantity of the lots on partition. She held this interest by a title which could not be fortified or improved. Her estate was not capable of enlargement or betterment, because she owned the entire estate. There was no additional interest she could acquire and merge into that to which the lien attached. After the lien became fixed it was not capable of expansion to include distinct and independent shares, and those which were free of the lien when it was perfected remained as free in the hands of Mrs. Loftus as they were before she purchased them.

The case of *Lumber Co. v. Fretz*, 51 Kan. 134, cited by the appellee, is entirely consistent with these views. Fretz was in undisputed possession and claimed the right of such possession when the improvement was made. Afterward he received a conveyance of the legal title, but by just what right did not appear. The court held that in the absence of a contrary showing the conveyance was a recognition of a prior equitable title. When the legal and equitable titles merged the lien attached to the whole estate.

## Marks v. Chumos.

The appellant claims the trial court committed error in some matters which have not been discussed. If so her substantial rights were not prejudicially affected.

The judgment of the district court is modified so far as it relates to the appellant, Mary R. Loftus, to include no more than the foreclosure of the lien upon the one-sixth interest in the property which she originally possessed. As modified the judgment is affirmed, with costs to the appellant.

A. MARKS, *Appellee*, v. C. G. CHUMOS, *Appellant*.

No. 16,415.

## SYLLABUS BY THE COURT.

1. **STATUTE OF FRAUDS—Lease for More than a Year Signed by One Partner Only—Obligation of the Firm.** Where one of two partners enters into a contract in writing for the lease of a building for a term of three years, for the benefit of the firm, although the contract is made only in the name of one, and is signed by him as the lessee and by the lessor, and the partners thereafter enter into the possession of the leased property and occupy it for a time, the lease is the written contract of the partner who did not sign the same as well as of the partner who did sign it.
2. ——— **Lease for More than a Year—Oral Assignment by Lessee—Oral Agreement by Assignee to Comply with Terms.** Where a contract of lease for a term of three years is executed by one person as lessee and by the lessor, and the lessee takes possession of the property and occupies it for a time under the terms of the lease, and thereafter sells all his stock of merchandise in the building leased and all his rights under the lease to a third person, by oral agreement only, and such third person enters into the possession of the property and occupies it for a considerable time and orally agrees with the lessor to comply with all the terms of the lease, and for several months pays the rent in accordance with the terms of the lease, the lease becomes the written contract of such third person.

---

Marks v. Chumos.

---

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed June 11, 1910. Affirmed.

*Edward T. Riling*, and *J. S. Ensminger*, for the appellant.

*Ord Clingman*, for the appellee.

The opinion of the court was delivered by

SMITH, J.: The appellee brought suit in the district court of Douglas county against the appellant and one Limperakis. In his first cause of action he claims damages for the nonperformance of a contract of lease in the sum of \$480. In his second cause of action he claims damages for injuries to the leased building in the sum of \$200. Upon his first cause of action the plaintiff recovered judgment against both of the defendants in the sum of \$280, and upon the second cause of action he recovered judgment against the appellant only for the sum of \$120. Chumos alone appealed, and Limperakis is not made a party in this court.

It is apparent that the rights of Limperakis might be affected by a decision in this case, and technically the motion of the appellee to dismiss might properly be sustained, but we have reviewed the entire case and prefer to decide it upon its merits.

The first contention of the appellant is that the court erred in admitting evidence upon the question of his alleged copartnership with Limperakis, and also evidence tending to show that he bought the stock of goods in the building from Limperakis and orally agreed to carry out the terms of the lease; also that the court erred in admitting evidence of conversations between Chumos and the lessor tending to show that Chumos orally agreed to assume the contract of lease and to carry out its provisions, although no written assignment thereof had been made. We have examined the evidence on these points and think it was competent for the purpose for which it was introduced, and find no error in its admission.

The appellant also contends that the lease, not having been signed by him and not having been assigned in writing to him, is void as between him and the lessor, under the statute of frauds and perjuries (Gen. Stat. 1868, ch. 43, § 5; Gen. Stat. 1909, § 3837), and that his oral agreement to assume the obligations of Limperakis is void under section 3838 of the General Statutes of 1909 (Laws 1905, ch. 266, § 1).

There was evidence tending to show that Chumos and Limperakis were copartners in the business to be carried on in the leased premises, that the lease was made in the interest of, and for the benefit of, the copartnership, and that the copartnership accepted the lease and occupied the premises under it for a time. Authorities are abundant that if one partner had purchased the property and taken a deed thereto in his own name, under like circumstances, the real estate would have become the property of the copartners, and that the partner taking the legal title would hold the same in trust for the benefit of himself and his copartner, and the copartner could assert his interest in the property, although he had no written conveyance thereof. The principle applies to this case, and the lease of the copartner became the lease of Chumos, for whose benefit it was in part made.

Even if there was no copartnership between Chumos and Limperakis, if Limperakis rented and occupied the premises on his own account, and with the knowledge and consent of the lessor sold and assigned his unexpired term to Chumos, and Chumos received the written lease, entered into the possession of the premises thereunder, and paid rent in accordance with the terms of the lease for months, the lease became a contract in writing between the landlord and Chumos for the unexpired term. (See *Barahyte v. Real-estate Co.*, 66 Kan. 390, and cases there cited.)

It is also contended that the judgment upon each cause of action is for a larger amount than the evidence

---

Gregory v. Kennedy.

---

justified. The judgment in each instance is for a smaller amount than is claimed in the petition. And there is evidence sustaining the amount of the judgment as to each cause of action.

The judgment is affirmed.

---

W. S. GREGORY, *Appellant*, v. KENNEDY BROTHERS,  
*Appellees*.

No. 16,429.

SYLLABUS BY THE COURT.

**AGENT'S COMMISSION—*Land Listed with Different Brokers—Procuring Cause of Sale.*** A landowner listed his land for sale with the plaintiff and also with the defendants. The plaintiff procured a purchaser, and induced him to go and see the land and to purchase. The defendants interfered and took the purchaser to the owner, who asked them if the customer was not the customer of the plaintiff. They said he was not, and, by misrepresentations to the owner and the purchaser, prevented the plaintiff from closing the sale and consummated it themselves. Upon these facts it is *held*, in an action between the agents to recover the commission, that the plaintiff was the primary, proximate and procuring cause of the sale and entitled to the commission.

Appeal from Pawnee district court; CHARLES E. LOBDELL, judge. Opinion filed June 11, 1910. Reversed.

STATEMENT.

W. S. GREGORY brought suit against Willis Jennings to recover a commission of \$101 for the sale of a farm. Kennedy Brothers filed an interplea, claiming that the commission was due them. Jennings deposited the amount of the commission with the court, and by agreement of the parties Kennedy Brothers were substituted as defendants. The case was tried without a jury, and

---

Gregory v. Kennedy.

---

the court made findings of fact and conclusions of law as follow:

**"FINDINGS OF FACT.**

"(1) That during the month of January, 1909, Jennings listed the above-described land with the plaintiff for sale, price to be \$3000, and agreed to pay plaintiff a commission of \$101 for effecting a sale at that price.

"(2) That the land had been previously listed by Jennings with Kennedy Brothers upon the same terms.

"(3) That about February 4, 1909, the plaintiff, Gregory, found a prospective purchaser for the sale of the land in the person of C. L. Converse, and told Converse of the land, describing it in detail; that at the time Converse told plaintiff he was going to Gray county to look at other lands, and that if he did not purchase there he would return and look at the land in question; that later he returned to Larned and agreed with plaintiff to go and look at the land in question, and buy the same if it suited him.

"(4) That the plaintiff was the first one to introduce the subject of purchasing the land in question to Converse, and that no other person had anything to do with inducing him to go and see the land.

"(5) That on the 5th of February, 1909, said Converse arranged to go and see the land, going by train from Larned to Burdett, Kan., as per his agreement with plaintiff.

"(6) That on that date Kennedy Brothers, being informed of his purpose to go to see the land in question, solicited him to go with them and see this land with other lands, and that Converse did so.

"(7) That on the day following he returned with Kennedy Brothers to Larned, the home of Jennings, and offered to buy the land for \$2900.

"(8) That Kennedy Brothers took the matter up by telephone with Jennings, who agreed to sell the land at that price and pay the commission of \$101.

"(9) That in this telephone talk Jennings asked Kennedy Brothers if this customer was Gregory's man, and they told him he was not.

"(10) That when Kennedy Brothers took Converse to see the land they knew he was Gregory's customer, and that the land had been called to his attention by Gregory, and that he was going to see it, at Gregory's instance, as a prospective purchaser.

---

Gregory v. Kennedy.

---

"(11) That before closing the trade Converse asked Kennedy Brothers if it would not be better to see Mr. Gregory before closing the matter up, and they said to him that Gregory had nothing to do with it.

"(12) That on the last-named date, and immediately after the conversation by telephone between Kennedy Brothers and Jennings, Converse bought the land for the sum of \$2900, made a cash payment thereon, and later completed the payment and acquired the land."

"CONCLUSIONS OF LAW.

"(1) That Jennings had the right to list the land with as many agents as he might desire, and that he would be liable for but one commission, and that to the party who first brought him the purchaser (which in this instance is Kennedy Brothers), and that by paying the money into court he has discharged his full duty in the premises and should be discharged without cost.

"(2) That while Gregory was the man who first found the customer, Kennedy Brothers, being the ones who brought the customer to the seller, are entitled to the commission.

"(3) That while the practice of inducing a known customer of another real-estate agent to abandon such agent may be questionable as a matter of business ethics, it is permissible as a matter of law, and a real-estate agent has no vested rights in a customer and no right to recover until he has brought such customer and seller together."

The court thereupon dismissed Jennings from the case, without costs, and ordered the sum deposited by him in court to be paid to Kennedy Brothers, and rendered judgment for costs against the plaintiff. The plaintiff appeals.

*G. Polk Cline*, for the appellant.

*W. H. Vernon*, and *W. H. Vernon, jr.*, for the appellees.

The opinion of the court was delivered by

PORTER, J.: From the findings it appears that Kennedy Brothers had nothing to do with inducing the purchaser to go and see the land, and there is no finding



---

Gregory v. Kennedy.

---

that anything they did induced him to take it. Without their efforts he would have purchased. All they did was to close the sale, which would have been done by the plaintiff if they had not by misrepresentations, both to the owner and the purchaser, prevented the plaintiff from closing it. They knew the purchaser was the plaintiff's customer, but in their telephone talk with the owner, when he asked them if the customer was Gregory's man, they said he was not. The owner seems to have had some information about Gregory's man, and the inference is that they were not very far apart when the defendants interfered.

In *Beougher v. Clark*, 81 Kan. 250, a case somewhat like this in its facts, it was held that where property is placed in the hands of several brokers the owner is bound to pay that one who is the primary, proximate and procuring cause of the sale, notwithstanding the sale is consummated by another broker on different terms. Here the proximate, predominating and procuring cause of the sale was the plaintiff, and upon the findings he was entitled to judgment. (*Votaw v. McKeever*, 76 Kan. 870; *Beougher v. Clark*, supra; 19 Cyc. 260.)

The seller has paid the money into court and departed. He no longer has any interest in the controversy between the agents as to which of them has the better right to the commission. In such a case it would seem that no arbitrary rules of law respecting the liability of a principal to his agent should be permitted to defeat plain justice.

The judgment is reversed and the cause remanded, with directions to enter judgment for the plaintiff.

E. H. HIMMELWRIGHT, *Appellant*, v. HATTIE M.  
BAKER, *Appellee*.

No. 16,437.

SYLLABUS BY THE COURT.

1. EVIDENCE—*Opinion Testimony—Speed of an Automobile.* A person injured upon a street crossing by an automobile, who sees it approaching him at a distance of ten or fifteen feet and who has frequently observed the passage of automobiles and other vehicles, and ridden in them, and made observations of their rate of speed, may give his opinion of the speed of the car at the time of the collision.
2. ——— *Error Rendered Immaterial by Special Findings.* In view of the explicit findings of the jury that the plaintiff failed to exercise due care for his own safety and that the defendant was not negligent, and all the circumstances proven, it is *held*, that the error in excluding the testimony referred to was not prejudicial.
3. PERSONAL INJURIES—*Contributory Negligence—“Last Clear Chance”—Instructions.* Instructions relating to the doctrine of the “last clear chance” are examined, and the rule stated in *Dyerson v. Railroad Co.*, 74 Kan. 528, is followed and applied.

Appeal from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed June 11, 1910. Affirmed.

*John W. Adams*, and *George W. Adams*, for the appellant.

*J. A. Brubacher*, and *James A. Conly*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: This action was for damages caused by a collision with the defendant's electric automobile at a street crossing in Wichita. The plaintiff, Himmelwright, alleged that the automobile was negligently propelled against him, without signal or warning, and at a high and dangerous rate of speed. The defendant was driving her car eastward, approaching the cross-

ing over which the plaintiff was walking southward, when the car struck and injured him. A city ordinance provided a limit upon the speed of automobiles of eight miles an hour, and it was alleged that the defendant was running her car at the rate of fifteen miles per hour, and that she was negligent in failing to control it or give any signal or warning after seeing the plaintiff in a dangerous position. The verdict was for the defendant.

Error is assigned upon the rejection of the plaintiff's testimony concerning the speed of the car at the time of the collision. He testified that the car was ten or fifteen feet from him when he first saw it; that it was running so fast he had no time to do anything, but that he tried to get away from it. He was then asked at what rate of speed it was running, and answered that it was fifteen miles an hour, but the answer was stricken out on the ground that it appeared that he did not have sufficient opportunity to form an opinion on the question of speed. The evidence was competent. An objection to such testimony goes to its weight rather than to its admissibility. (*Railway Co. v. Holmoway*, 71 Kan. 1; *Porter v. Buckley*, 147 Fed. 140.)

A bystander, called by the plaintiff, who witnessed the occurrence and who appeared to have an opportunity for estimating the speed of the car, testified that it was fifteen miles per hour, while the defendant testified that it was four miles per hour.

The jury returned special findings, among which were the following: That 100 feet from the point of collision the speed of the automobile was five miles per hour; that it decreased from that point to four miles per hour when it struck the plaintiff; that there was nothing to prevent the plaintiff from seeing it when 200 feet from the point where it struck him; that he did not look for approaching vehicles or observe the automobile until nearly in contact with it, and exercised no care to avoid the collision, but was proceeding

---

Himmelwright v. Baker.

---

with head bowed forward and cap pulled over his forehead, so as to shut off his vision to some extent; that he was looking to the pavement in front of him; that nothing in his appearance or conduct indicated an intention to cross in front of the automobile, and that if he had used ordinary care the collision would have been avoided. The jury also found that the defendant acted in an emergency—that a boy on a bicycle was in the path of the automobile, in dangerous proximity, about the same moment that the plaintiff came upon the crossing, just before the injury; that the fear of a collision with the bicycle caused the failure of the defendant to avoid the collision with the plaintiff; and that in this emergency she did not do or fail to do anything which a person of ordinary prudence would have done or failed to do in similar circumstances. These and other findings show that the jury found that the defendant was not negligent as charged, but that the plaintiff himself failed to exercise ordinary care for his own safety. In the light of these findings, especially the findings of contributory negligence, and the circumstances shown, we are constrained to say that the error in striking out the plaintiff's estimate of speed is not of sufficient importance to warrant a reversal. His own conduct prevented a recovery unless, after discovering that he was in a perilous situation and was apparently unaware of the impending danger, the defendant failed to do what she reasonably could to avoid injuring him.

It is contended that notwithstanding the findings of the plaintiff's negligence the defendant was still bound to avert the collision after she discovered his peril, if by reasonable efforts she could have done so, and that the jury should have been so instructed. The instructions were voluminous; among others, the following were given:

"When the defendant had time to realize or by the exercise of proper lookout should have realized that the plaintiff was getting into a dangerous position in

---

Himmelwright v. Baker.

---

front of or near the pathway of her machine, that then she was required to exercise increased exertion to avoid colliding with him; for it is only when the operator of an automobile has had time to realize, or by the exercise of proper care should have realized, that a person whom he or she meets is in a somewhat helpless condition, or in a position of disadvantage, and therefore seemingly unable to avoid the coming automobile, that operator is required to exercise increased exertion to avoid collision.

"If you find from the evidence in this case that the plaintiff was knocked down by the defendant's automobile, or thrown a distance ahead of said automobile and fell upon the street and pavement in a helpless condition, then you are instructed that it would become the duty of the defendant, if by the exercise of ordinary care she saw and knew, or could have seen and known, his perilous and helpless condition, to have used due care and caution and all means within her power to have stopped and slackened the speed of said automobile to avoid further injury to the plaintiff, and if she failed to do so she would be guilty of negligence and liable for all damages thereby sustained by plaintiff, as claimed and set forth in his petition, without reference to the question of contributory negligence."

There was evidence tending to show that the plaintiff was struck a second time, and the last instruction was therefore applicable. It will be noticed, however, that while with respect to the last collision the court said that it was the defendant's duty to use all means in her power to avoid further injury, yet with respect to the first collision it was stated that the defendant, after discovering that the plaintiff was in a dangerous position in front of her machine, was only required "to exercise increased exertion to avoid colliding with him." Thus the court undertook at least to state the doctrine of the "last clear chance," and so far as it applied to the second collision the plaintiff certainly can not complain. As this doctrine was examined and stated in *Dyerson v. Railroad Co.*, 74 Kan. 528, further statement of the rule here is unnecessary.

The language used in the instruction relative to the

---

Himmelwright v. Baker.

---

first collision is not very explicit, and it was therefore proper for the plaintiff to ask for a definite instruction on the subject. This he essayed to do in the following request:

"The jury are instructed that even if the plaintiff was not exercising ordinary care at the time of the collision, if the defendant saw or could have seen the plaintiff's dangerous position by the use of ordinary care and caution, but negligently failed to take steps to prevent a collision, she would be liable to the plaintiff for whatever damages he may have sustained by reason of such negligence on the part of the defendant."

In the Dyerson case, *supra*, it was said:

"A plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, can not recover damages therefor, although the defendant ought to have discovered (but did not in fact discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort." (Syllabus.)

In the opinion a quotation from page 387 of volume 7 of the American and English Encyclopædia of Law, that "it is only when the negligence of one party is subsequent to that of the other that the rule can be invoked," was approved (74 Kan. 537), but in the instruction requested a situation was supposed of concurrent negligence at the very time of the accident. The plaintiff having failed to request a proper instruction on the subject, and the special findings having exonerated the defendant from any fault, while finding the plaintiff guilty of contributory negligence, the judgment ought not to be reversed because of inaccuracy in the language used in the instructions complained of. Upon the facts found a recovery could not be sustained.

The judgment is affirmed.

—

TOBE FLEEMAN, *Appellee*, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellant*.

No. 16,442.

SYLLABUS BY THE COURT.

PRACTICE, SUPREME COURT—*Review of Void Judgment—Case-made*. A party is entitled to appeal from and obtain a reversal of a void judgment brought to the supreme court on a case-made.

Appeal from Wyandotte circuit court; FRANK D. HUTCHINGS, judge. Opinion filed June 11, 1910. Reversed.

*M. A. Low*, and *Paul E. Walker*, for the appellant.

*L. F. Bird*, and *H. G. Pope*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: In this proceeding the Chicago, Rock Island & Pacific Railway Company asks that the judgment rendered against it and in favor of Tobe Fleeman in the circuit court of Wyandotte county be set aside and reversed. The contention is that the court had no existence, and that the judge of the court who assumed to render the judgment was without authority. By chapter 52 of the Laws of 1908 the legislature undertook to create the circuit court of Wyandotte county and to define its jurisdiction, and in pursuance of the provisions of the act a judge was appointed, who proceeded to try causes and exercise other judicial functions. The validity of the act creating the court was challenged by a proceeding brought in this court, and it was decided that the statute was repugnant to the constitution and without force. (*The State v. Hutchings*, 79 Kan. 191.) This cause, which was pending in the court of common pleas, was transferred to the circuit court, and at the end of a trial a decision in the form of a judgment was rendered against the appellant,

which it seeks to have annulled and reversed. As the act was unconstitutional the court and judge were without jurisdiction, and the judgment is therefore invalid. (*In re Norton*, 64 Kan. 842.) Is a void judgment reviewable? Although there is some conflict in the authorities, the rule in this state is that a judgment which is a nullity may be reversed and set aside in a proceeding in error. This was held in *Earls v. Earls*, 27 Kan. 538, where it was said:

"In such a case the defendant in error claims that the judgment is not void, but that it is valid, and that he has a right to enforce it, and therefore he can not, for the purpose of defeating the proceedings of the plaintiff in error, say that the judgment is void and that the plaintiff's petition in error should be dismissed; while on the other hand, the plaintiff in error may simply treat the void judgment as a merely erroneous one, and ask that it be reversed." (Page 543.)

While the decision attacked is a nullity, it is in the form of a judgment, and appellee is asserting that it is a valid and binding obligation. Although void, it may be treated as in existence so far as to allow appellant to challenge its validity on appeal and to enable this court to declare its invalidity and reverse it. (*Winkfield v. Brinkman*, 31 Kan. 25; *Shaffer, Adm'r, v. Brinkman*, 31 Kan. 124; *Kidder v. Fay*, 60 Wis. 218; *Shoemaker, Aud. of State, v. The Board of Comm'rs of Grant Co. and Another*, 36 Ind. 175; *Louisville, New Albany and Chicago Railway Company v. Lockridge*, 93 Ind. 191; *McCoy v. Allen et al.*, 16 W. Va. 724; *A. L. Martin, Ex parte*, 5 Yerg. [Tenn.] 456; *Smith v. Jacobs*, 77 Mo. App. 254; *Loeb v. Smith*, 52 N. Y. Supp. 677; *Powell App. Proc.* p. 265.)

Appellee appears to concede that a void judgment might be reversed if the case were here on a transcript of the record, but asserts that as it is brought on a case-made which the trial court had no authority to settle it can not be considered. The judgment attacked is preserved and presented in one of the methods pre-



---

Stewart v. Falkenberg.

---

scribed by statute for the taking of an appeal. If the judgment may be reviewed at all, no reason is seen why its validity may not be determined as well upon a case-made as upon a transcript of the record. On the face of the record, as preserved, it is clearly shown that the judgment is void, and it is therefore reversed.

---

THE JOHN T. STEWART ESTATE (INCORPORATED),  
*Appellee*, v. JOHN FALKENBERG, *Appellant*.

No. 16,448.

SYLLABUS BY THE COURT.

1. JOINDER OF CAUSES OF ACTION—*Reformation and Enforcement of Chattel Mortgage*. Where a chattel mortgage is intended by the parties thereto to run to the administrator of a deceased person, but by mistake the grantee is described as the deceased person, the instrument may be corrected and reformed in the same action in which it is sought to be enforced.
2. PARTIES—*Action to Reform and Enforce Chattel Mortgage*. In an action brought to reform a chattel mortgage, and to enforce the same by a judgment against a third party for the proceeds of the sale of property included in the mortgage, the makers of the instrument are proper parties defendant.
3. ——— *Appeal and Error—Disclaimer in Trial Court*. In such an action, where the mortgagors enter their appearance and file a written consent that the mortgage may be reformed, but take no part in the other proceedings in the case, they are not necessary parties to an appeal in this court by the defendant against whom judgment for the value of the property is rendered.
4. ——— *Foreign Corporation*. By the provisions of chapter 153 of the Laws of 1903 (Gen. Stat. 1909, § 1907) a foreign corporation holding a mortgage on real or personal property in this state may maintain an action to enforce the same without being authorized to engage in business within the state.
5. EVIDENCE—*Transactions with Persons Since Deceased*. A witness is not incompetent under section 322 of the old code

---

Stewart v. Falkenberg.

---

(Gen. Stat. 1901, § 4770; Code 1909, § 320) in a case where the adverse party is the assignee of the administrator of an estate.

Appeal from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed June 11, 1910. Affirmed.

*F. A. Dinsmoor, James Lawrence, and Levi Ferguson*, for the appellant.

*Ed T. Hackney*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: This was an action to reform a chattel mortgage covering eighty acres of wheat and to enforce the same by recovering a judgment for the proceeds of the wheat. John T. Stewart, of Sumner county, died September 1, 1905, and F. M. Borders was appointed as administrator. The mortgage was executed October 9, 1905, by Tom Shipp and his wife, and covered wheat just sown. It ran to John T. Stewart, but was given to F. M. Borders, the administrator, and it is claimed that by inadvertence it was made to read to John T. Stewart instead of F. M. Borders, the administrator.

About the time the mortgage was executed Falkenberg obtained a judgment against Tom Shipp before a justice and levied an execution upon the wheat. He purchased the same at sheriff's sale, and afterward harvested the crop and retained the proceeds. Afterward a company was organized under the laws of the state of Nevada, known as the John T. Stewart Estate (Incorporated), which claims to have bought the mortgage from Borders, administrator. The company brought this action against Falkenberg to enforce the mortgage and recover the proceeds of the wheat, and made Shipp and wife defendants for the purpose of reforming the chattel mortgage by having it run to F. M. Borders, administrator. Falkenberg demurred

---

Stewart v. Falkenberg.

---

to the petition on the ground that the plaintiff had no legal capacity to sue; that there was a defect of parties defendant, and that several causes of action were improperly joined. The demurrer was overruled. Tom Shipp and wife appeared in the action, but made no defense, filing an answer consenting to the reformation of the mortgage. There was a trial and a decree reforming the mortgage, and judgment rendered against Falkenberg for \$239, the value of the wheat. He appeals.

There is a motion to dismiss the appeal on the ground that Tom Shipp and Mary Shipp were not made defendants in error, were never served with summons, and have never entered an appearance in this court. Section 2 of chapter 278 of the Laws of 1901 (Civ. Code, § 542a; Gen. Stat. 1901, § 5020) provides that it shall not be necessary to make any person a party to the petition in error who did not appear at the trial and take part in the proceedings from which the appeal is taken or who shall have filed a disclaimer in the district court, and further provides that anyone who was a party to the action in the district court may be made a party here where it appears that he might be affected by a reversal of the judgment from which the appeal was taken. The motion to dismiss can not be sustained. The Shipp's appeared in the action below and filed what amounted to a disclaimer. They consented that judgment might be rendered against them reforming the instrument. In the further proceedings in the case they had no real interest. The reversal of the judgment would not affect their rights. True, it is urged that they would be affected by a reversal because they are interested in having the proceeds of the wheat applied in satisfaction of their mortgage; and it is said that if the plaintiff should lose the proceeds of the wheat by a reversal of the judgment Mary Shipp, who signed the mortgage in the capacity of surety for Tom Shipp, will be liable for the

debt. But, in order to make them necessary parties here, it must appear that a reversal of the judgment would itself affect their rights. Their rights can not be directly affected by a reversal of the judgment against Falkenberg for the proceeds of the wheat. They took no part in the proceedings to enforce the mortgage as against him, and no judgment was sought against them except to reform the mortgage, a mere formal matter to which they consented. They are not in any sense parties to the judgment which is sought to be reversed, and can only be indirectly affected by its reversal.

On the merits of the case we are unable to find anything substantial in the claims of error. There was no misjoinder of causes of action. It was an action to reform a mortgage and enforce it. Under the liberal provisions of the code a written instrument can always be reformed in the same action in which it is sought to be enforced. (*Miller v. Davis*, 10 Kan. 541.)

Nor is it necessary that each and all of the defendants should be affected alike in an action to enforce a mortgage. Parties are made defendants to actions of this character against whom no personal judgment can be taken and against whom not even a judgment for costs can be entered, but they are necessary parties because their rights are affected.

There is no force in the objection that the plaintiff had no right to maintain the action. It appears from the evidence that the plaintiff is a foreign corporation engaged in loaning money on real and personal property in this and other states, and in order to maintain an action to enforce its securities it is not required to be authorized to engage in business in the state. (Laws 1903, ch. 153; Gen. Stat. 1909, § 1907.)

Complaint is made because Shipp was permitted to testify. It is claimed that he was incompetent under section 322 of the code of civil procedure (Gen. Stat. 1901, § 4770; Code 1909, § 320.) This is not a case

---

Linker v. Railroad Co.

---

where the adverse party is an executor, administrator, heir at law or an assignee of a deceased person. The plaintiff is the assignee of the administrator. Besides, Shipp was not testifying as a party in his own behalf, although he was interested indirectly in the result of the action.

Most of the other objections are based upon the theory that the cause of action was one in tort for the conversion of the wheat. It was, in fact, an action to enforce the mortgage. As the purchaser and holder of the mortgage the plaintiff could enforce the same either by foreclosing it or by an action to recover the proceeds of the property included in the mortgage, and could waive the tort and recover upon the implied contract to pay the value.

The liability of the defendant did not depend upon the precise date when he sold the wheat, if the sale occurred while the mortgage was a lien upon it.

The other claims of error are not deemed of sufficient importance to require comment. No error appears in the record, and the judgment is affirmed.

---

JOHN F. LINKER, *Appellant*, v. THE UNION PACIFIC  
RAILROAD COMPANY, *Appellee*.

No. 16,445.

SYLLABUS BY THE COURT.

1. RAILROADS — *Injury to Licensee — Proof of Negligence in Switching Cars—Defective Appliances.* A car was set out by the defendant upon its sidetrack at an elevator, to be loaded. The plaintiff, an employee of the elevator company, was, in pursuance of his duty, and with due care, at work in the car, preparing it to receive grain. The same trainmen that had set out the car, about thirty minutes afterward, switched a car belonging to another company out of the same train upon this sidetrack, and by a push from the engine and cars propelled it down the sidetrack over 700 feet from the switch to the grain car, with which it collided with such force

## Linker v. Railroad Co.

as to injure the plaintiff at work therein. The plaintiff's presence in the car was known to the trainmen, but no notice or warning was given to him. A brakeman upon the moving car, intending to stop it at a point 300 feet from the grain car, was unable to do so because the brake for some reason failed to work properly. The evidence does not show in what respect the brake was defective. It is *held*, (1) that the collision and resulting injuries, in the circumstances, by the means and in the manner stated, constituted evidence of negligence; (2) that, in the absence of any other evidence or explanation, the fact that the brake failed to do its ordinary work and the fact that because of its failure the brakeman was unable to stop the car were not sufficient to establish a complete defense; and (3) that a general verdict for the plaintiff should be upheld.

2. **PLEADINGS—Negligence.** The petition contained an allegation that the defendant, by its agents, servants and employees, negligently and without notice or warning switched and propelled a car down the sidetrack against the car in which the plaintiff was at work with such force as to cause the injury for which a recovery was sought. It is *held*, that the facts stated in the preceding paragraph are within the issues.

Appeal from Lincoln district court; **ROLLIN R. REES**, judge. Opinion filed June 11, 1910. Reversed.

*E. A. McFarland*, and *John J. McCurdy*, for the appellant.

*R. W. Blair*, *H. A. Scandrett*, and *B. W. Scandrett*, for the appellee.

The opinion of the court was delivered by

**BENSON, J.:** John F. Linker sued for damages resulting from injuries to his person, suffered while preparing a car standing upon a sidetrack for the reception of grain. He alleged that the injuries were caused by the negligence of the defendant in carelessly pushing another car against the one in which he was at work. The answer contained a general denial, and an averment of contributory negligence. A verdict was returned for the plaintiff, but upon the special findings a

judgment was rendered for the defendant, from which the plaintiff appeals.

From the findings it appears that the defendant set out an empty car to be loaded with grain at an elevator. The plaintiff was an employee of the elevator company, and it was his duty to clean the car and put in grain doors preparatory to loading. Through a mistake the trainmen picked up a Rock Island car standing upon the siding and placed it in the same train from which the grain car had been detached. It was then discovered that the Rock Island car had been only partially unloaded, and orders were received to replace it upon the siding. To do this the train was moved east on the main track, the cars in the rear uncoupled, and this car was detached while the train was moving and was pushed west upon the sidetrack. By the momentum thus given, and because it was upon a down grade, this car moved on toward the grain car, which was standing 768 feet from the switch. When 300 feet from the grain car a brakeman upon the approaching car tried his best to stop it, by turning the brake, but because the brakes for some reason failed to act properly he was unable to do so, and it moved on, striking the grain car with such force as to injure the plaintiff at work therein. The trainmen knew of the presence of the plaintiff in the grain car, and intended to stop the Rock Island car 300 feet from it, and the brakeman could have stopped it there had the brake responded in the ordinary way to his efforts. This grain car had been standing at the elevator thirty minutes when the collision occurred. The plaintiff exercised due care and caution, and no warning or notice was given to him that the Rock Island car was to be sent down the sidetrack. The petition contained the following allegations of negligence:

“Plaintiff alleges and says that said defendant, by its agents, servants and employees, without any notice or warning of any kind to this plaintiff, carelessly, negligently and heedlessly switched the same partly un-

---

Linker v. Railroad Co.

---

loaded car, which said defendant had before taken from the sidetrack, back, down and upon the same sidetrack upon which the car, in which the plaintiff was working, and said defendant, by its said engine, operated by the agents, servants and employees of said defendant, without any notice or warning to this plaintiff, carelessly, negligently and heedlessly switched, pushed and propelled, with great force, speed and violence, said partly loaded car upon and against the said car in which the said plaintiff was then working, and struck said car with great force and violence, thereby knocking the said plaintiff from his feet and throwing said plaintiff, by reason of the great force of the moving car, upon his back."

The district court awarded judgment for the defendant notwithstanding the general verdict, upon the ground, as it seems, that defendant could not be held liable under the foregoing allegations of negligence if the collision occurred because of a defect in the brake, not discernible from a casual examination, and no more force was used in switching the car than reasonably prudent men would have used.

The averment of the petition is that the defendant negligently switched the Rock Island car against the grain car. It is true that it is alleged that this was done by its agents, servants and employees, but as corporations can not in such matters act otherwise, the negligence charged is that of the defendant and not that of any particular employee or class of employees. No motion to make the charge more definite was made. The defendant could be negligent in switching this car by the use of defective or insufficient instrumentalities as well as by the careless use of sufficient instrumentalities. In either case the negligence would be that of the defendant. Therefore the allegations of negligence were broad enough to include the use of a defective brake, as well as the failure properly to use a good brake. The contention of the defendant that the use of a defective brake was not within the issues is based upon an erroneous construction of the petition.



---

Linker v. Railroad Co.

---

The duty of a railway company to a person in the situation of the plaintiff is stated in section 1265c of the second edition of volume 3 of Elliott on Railroads thus:

"Shippers and consignees of freight on railroad premises for the purpose of loading and unloading cars are properly there and are not trespassers, or bare licensees, and the railroad company is bound to use reasonable care to avoid injuring them while so engaged. If such persons while so engaged, and without negligence on their own part other than that inattention to their own safety which an absorption in the duties in which they are engaged naturally produces, are hurt by the negligence of the railway company, they have an action for damages. It is a duty of switch crews with knowledge or the means of knowledge that persons are loading or unloading cars to warn them of an intention to switch cars over a track on which their car is placed."

This court, in a case involving the same question, said:

"Where a shipper of stock has a contract with the railway company for himself to load his stock upon the cars of the company at its stockyards, and a car is furnished him near the chute of the yards for his use, and one of his employees uncouples it from another and pushes it down to the chute for the purpose of loading the stock, the railway company in the management of its other cars owes the duty of exercising ordinary care and diligence to the shipper and his employees while they are engaged in loading the car and doing such other work preparatory to loading as is usual and necessary to do." (*U. P. Ry. Co. v. Harwood*, 31 Kan. 388, syllabus.)

The same rule is tersely stated in section 1841 of volume 2 of Thompson's Commentaries on the Law of Negligence and in *C. & N. W. Ry. Co. v. Goebel*, 119 Ill. 515, where the facts were quite similar to the facts in this case, and may be found in many decisions.

There was a clear track for over 700 feet from the switch to the car in which the plaintiff was working. This car had just been placed there by the same train-

men, who knew of the presence of the plaintiff in the car. In such a situation, to propel another car against the one in which he was working with such force as to injure him was an unusual and apparently unnecessary occurrence, affording evidence of negligence. To meet this *prima facie* case the defendant offered evidence showing that the collision occurred because a brake would not work properly. As there was no explanation made or reason given for the failure of the brake to do its ordinary work it must be presumed, and seems to be conceded, that it was defective. The question is presented, therefore, whether a defective brake upon a car in the defendant's train, which it was operating, relieves it from the consequences of an otherwise negligent act.

The defendant contends that, having shown that the collision was caused by a defective brake and that the car belonged to another company, its defense was complete. It is insisted that, to show liability, proof should have been made by the plaintiff that the defect was so obvious that the trainmen doing the switching must have seen it. It was sufficient, however, for the plaintiff to show the negligence of the defendant or of any agent or employee causing the collision, and his injury therefrom. The jury did not find whether the defect was readily apparent or not, nor was there any finding or evidence relating to an inspection of the car. It is argued by the defendant that the burden was upon the plaintiff to prove a breach of the duty of inspection, and that if it had been proven it was not within the issues. The precise question, however, is whether the proof of the defective brake was a complete defense. It is deemed insufficient because, in the absence of any other evidence or explanation, the use of the car in the circumstances and manner in which it was used (with an insufficient brake and without other means of control, and without warning to one known to be in a place of danger from such use) was a negligent act. It was not

sufficient to show that the collision was caused by a defective brake, without showing that the defendant was not at fault in using it, for such use without explanation appeared to be negligent. The duty of inspection of foreign cars is referred to in the argument, and has been stated by this court in the following words:

"It is the duty of a railroad company to inspect cars owned by or received from another company, which the employees of the former company are required to handle or use, where there is time and opportunity to do so, and it will be liable to its employees for injuries resulting from defects in such cars which an ordinary inspection would have discovered." (*Railroad Co. v. Penfold*, 57 Kan. 148, syllabus.)

The matter of inspection, however, is only incidentally involved here. Counsel for the defendant say that the defendant's testimony to the effect that the conductor and brakeman found that the car was in apparent good condition "was not introduced for the purpose of showing that the defendant had fulfilled its duty with respect to the inspection of foreign cars, but was simply introduced for the purpose of showing that these trainmen did not know there was anything the matter with this car." In a case involving a situation essentially the same as presented in this record, except that the person injured was an employee of the railroad company, it appeared that such employee was unloading bricks into a car when other cars were backed against the one in which he was at work, causing injury to him. It was shown that the collision occurred because of a defective brake. In the opinion it was said:

"We think it enough to say that in our opinion it was wholly unimportant whose duty it was to inspect the couplings of the cars, brakes, etc., and how, on that occasion, the engineer managed his train. The facts are uncontroverted that appellee and others were put to work unloading a car standing on a spur of a sidetrack—i. e., a track having connection with other tracks only at one end. It was not at a place where there were

passing trains. There was not a single circumstance in evidence tending to prove that a laborer at that car ought to have anticipated that it might be disturbed while being unloaded. . . . It was therefore the duty of the appellant to bring no peril upon the laborer without first giving him timely notice. Either the cars ought not to have been brought into the position they were, before the bricks were unloaded, and without timely notice to the laborers of the danger thereby, or it should have been first ascertained that no danger to those laborers could result. No matter whose individual duty it was to inspect the company's brakes, etc., the obligation was upon appellant not to bring upon appellee and the other laborers, without previous timely notice, in the helpless condition they were, this danger, and to do so was, unquestionably, in fact, gross negligence, to which there was no contributive negligence on the part of appellee." (*Rolling Mill Co. v. Johnson*, 114 Ill. 57, 62, 63.)

The term "gross negligence" in the foregoing quotation is probably not applicable to the facts of this case, but that the defendant was negligent appears from the findings as we construe them in connection with the general verdict. The findings to the effect that the brakeman was unable to stop the car because the brake failed to work properly was not sufficient to avoid the effect of the other findings and of the general verdict finding the issues in favor of the plaintiff.

The judgment is reversed and the cause remanded, with directions to enter judgment for the plaintiff upon the verdict.

---

Robertson v. Howard.

---

FRED ROBERTSON *et al.*, Appellees, v. C. F. HOWARD,  
Appellant.

No. 16,462.

FRED ROBERTSON *et al.*, Appellees, v. FRED HOWARD,  
Appellant.

No. 16,463.

SYLLABUS BY THE COURT.

1. **BANKRUPTCY**—*Sale of Land in this State by Foreign Trustee—Jurisdiction.* The sale by a trustee in bankruptcy, under the orders of a United States district court in the state of Illinois, of a certificate of sale of state school land in Kansas conveys to the purchaser of such certificate no interest in the land in this state, none of the steps required by the laws of the United States being taken to sell, within this state, the land as such.
2. **SCHOOL LAND**—*Interest of Certificate Holder after Part Payment of Purchase Price.* The contract between the bankrupt and the state of Kansas, evidenced by the certificate of purchase, a part of the purchase price being paid, conveyed to the purchaser an equitable title to the land.
3. **EXECUTION SALE**—*Equitable Interest.* The purchaser's equitable interest in such land is real estate, and as such is subject to sale on execution. (Gen. Stat. 1868, ch. 104, § 1, subdiv. 8; Gen. Stat. 1909, § 9037, subdiv. 8; *Poole v. French*, 71 Kan. 391.)
4. **BANKRUPTCY**—*Title of Trustee to Bankrupt's Property—Interest of Bankrupt.* Upon an adjudication of bankruptcy and the appointment and qualification of a trustee the title and control of all the bankrupt's nonexempt property vests in the trustee, for the purpose of liquidating the debts of the bankrupt under the orders of the court. Subject to this purpose, the bankrupt retains an interest in the property, which, in case the property is not needed or is not disposed of for such purpose, and the bankrupt is discharged, recalls to the bankrupt all rights thus vested in the trustee.
5. ——— *Conveyance by Bankrupt During Pendency of Proceedings—Interest of Grantee.* If during the pendency of the bankrupt proceedings the bankrupt conveys all his interest in any such property, and thereafter is fully discharged, and any property so conveyed has not been used or disposed of, the reversionary title thereto follows such conveyance and vests in the grantee.

---

Robertson v. Howard.

---

Appeal from Rawlins district court; WILLIAM H. PRATT, judge. Opinion filed June 11, 1910. Affirmed.

STATEMENT.

CASE No. 16,462 was tried in the court below without a jury, under an agreement that all the evidence, findings and proceedings should apply equally to case No. 16,463, and the findings of fact and conclusions of law made by the court therein are as follow:

"FINDINGS OF FACT.

"This is an action in ejectment, brought by the said plaintiffs against the defendants to recover possession of the southeast quarter of section sixteen (16) in township one (1), of range thirty-four (34), in Rawlins county, Kansas, and for the rents of the same. At the March, 1908, term of the court a jury was duly waived by all the parties and the trial was had to the court. At the same time the parties in this action, and also the parties in the action number 2675, pending in this court, in which the plaintiffs in this action are also plaintiffs, and Fred Howard and John Nevil are defendants, agreed in open court that whatever the judgment and decision of this court might be in this first-mentioned action, No. 2676, the same should be held and considered to be applicable to, and a determination of, the last-mentioned case, all parties waiving a jury in said action as in the first. This action having been duly submitted to the court, the same was by the court taken under advisement until the November, 1908, term of this court.

"(1) The land involved in this suit is what is known in this state as school land, and the plaintiffs claim title thereto under the original purchaser thereof, and from assignments had from him and his grantors, and the defendant, C. F. Howard, claims title and ownership to the land by virtue of certain tax proceedings and school-land contract sale hereinafter referred to.

"(2) On the 22d day of December, 1884, a certificate of purchase was, by the county clerk of said Rawlins county, duly issued to a qualified purchaser for the sum of \$480, and the purchaser at that time duly paid the one-tenth thereof, being \$48, and by a succession of assignments one John H. Hagener became the owner of certificate of purchase and all rights to the land thereby

contracted for or conveyed. The said Hagener became such owner on the 28th day of October, 1901.

"(3) Some time prior to the sale of land for taxes in said county, on September 3, 1901, the provisions of chapter 162, Laws of Kansas of 1891, being paragraph 7659 of the General Statutes of the state of Kansas for 1901, were duly adopted by said county, and such law so adopted remained in full force and effect during all the years relating to the tax proceedings hereinafter mentioned.

"(4) On the 3d day of September, 1901, at a sale of lands for said county for delinquent taxes, the said land was by the county treasurer of said county of Rawlins, under and by virtue of the provisions of said chapter 162, Laws of Kansas for 1891, bid off in the name of said county for the delinquent taxes of the year 1900, for the sum of \$14.80, and afterward, and on September 28, 1903, the county clerk of said county assigned the tax-sale certificate to said land to defendant C. F. Howard for the sum of \$19.90.

"(5) The said sale of lands was had and held under and by virtue of a notice of such sale, in words and figures as follows: 'Delinquent Tax List. Office of county treasurer, Rawlins county, Kansas. Atwood, Kan., July 15, 1901. Notice is hereby given that taxes for the year 1900 on the following land and town lots remain due and unpaid, and so much of each lot or parcel of land as may be necessary will be sold at the county treasurer's office at public sale on the first Tuesday in September, 1901, and the next succeeding days, for the taxes, costs and penalties. F. L. Schwab, county treasurer.' Then follows a list of this and other lands.

"(6) Proof of the publication of this notice was never transmitted or deposited in the county clerk's office of said county. As a part of the costs of the assignment of said tax-sale certificate, and included therein, were the costs of sale of said land for the years of 1902 and 1903, and a redemption fee of fifty cents.

"(7) That upon these tax proceedings the county clerk of said county executed to defendant, Howard, a certificate of purchase of school land, upon the 28th day of September, 1903; afterward, and on December 18, 1903, the said clerk issued to defendant Howard a renewal certificate of purchase, in place of the former, and by virtue thereof defendant Howard entered into possession of said land and has ever since held posses-

sion thereof and received the rents thereon. Defendant Nevil makes no claim by answer, or otherwise, in this case. Upon these tax proceedings and certificate of school land issued by virtue thereof defendant Howard claims the right to said land.

"(8) In 1904, and prior to November 12 of said year, the said John H. Hagener was in the United States district court, southern division of the state of Illinois, and, by virtue of the judgment and order thereof, duly adjudged a bankrupt, and all of his property, including the said certificate of purchase of the land involved in this action, was placed in the hands and custody of said court as the property and assets of said bankrupt's estate, and one R. R. Hewitt was duly appointed and qualified as the trustee of said bankrupt's estate, and he duly entered upon his duties as such officer.

"(9) That on the 12th day of November, 1904, by virtue of an order made by said court so to do, a public sale, at the city of Beardstown, in the state of Illinois, was had, by the said trustee, of the assets of said bankrupt, including the said certificate of purchase, and at such sale one Henry Fraumann offered by his bid the sum of \$115 for said certificate of purchase and some other property of said bankrupt, and the said bid was, by the said trustee, accepted, and the sale being afterward reported to said court, the same was approved and confirmed by said court, and by virtue thereof the said trustee, on November 30, 1904, assigned and delivered the said certificate of purchase to the said Henry Fraumann.

"(10) That afterward the said Henry Fraumann and his wife, on July 19, 1905, sold, assigned and transferred and delivered the said certificate of purchase and his right to any rents of said lands, if any he had therein, to plaintiff, Fred Robertson, and thereafter, and on the 5th day of August, 1905, the said Fred Robertson and wife sold, assigned and delivered an undivided half interest in and to said certificate to said land, if any he had, as well as an undivided one-half interest in and to any rents or profits he had therein, to the said W. J. Ratcliff.

"(11) That thereafter, and on the 19th day of June, 1907, the said John H. Hagener and wife made, executed and delivered to the plaintiffs a quitclaim deed to said land, and also their assignment of said certificate



---

Robertson v. Howard.

---

of purchase, as well as their rights, if any, in and to any rents and profits of said land.

"(12) That upon the 20th day of November, 1907, the said John H. Hagener was duly discharged as such bankrupt from all his debts provable under the bankrupt law, and thereafter, and on the same day, the said R. R. Hewitt, as such trustee, was duly discharged and the said bankrupt proceedings were fully and finally closed up and disposed of.

"(13) That said John H. Hagener and his grantors paid all the taxes upon said land up to the year 1900, and caused to be broken all of land, before the defendant acquired his tax-sale certificate to said land.

"(14) On August 15, 1905, plaintiffs tendered to the county treasurer of said county the sum of \$630 lawful money, \$170 of which was for the benefit of defendant Howard, and which was the full amount that was then due the state of Kansas, the said county of Rawlins and the defendant, Howard, each of which tenders were refused, although they fully covered everything that was then due, and such tenders have ever since been held good.

"(15) That thereafter, and on the 5th day of January, 1907, in an action then pending in the supreme court of the state of Kansas, in which the plaintiffs herein were plaintiffs and the county treasurer of said county was defendant, a peremptory writ of mandamus was by said court issued to said county treasurer to take the said money so tendered to him by said plaintiffs, the said \$630, and as such officer receipt therefor, which he did, and such order, so far as the receipt and acceptance of such tender is final only as to the parties to said action, and thereafter and before the commencement of this action a patent for said land was issued to plaintiffs.

"(16) That the rents and profits of said land, so far as received by defendant, Howard, amount to the sum of \$150, and the rental value of said land is \$50 per annum.

#### "CONCLUSIONS OF LAW.

"(1) The plaintiffs, Fred Robertson and W. J. Ratcliff, by virtue of the various conveyances, assignments and certificates executed and delivered to them by the various parties named in the special findings of fact, and by the acts done by them therein stated, have ac-

quired a full and complete title and ownership in and to the land described and are the owners of the same, and are entitled to the possession thereof.

"(2) That as the board of county commissioners of Rawlins county has adopted the provisions of chapter 162, Laws of Kansas, 1891, being paragraph 7659 of the General Statutes of the state of Kansas for 1901, and the same being in full force and effect at the time of the sale of said land for delinquent taxes, and such sale being under the provisions of such laws, and the said property having been bid in by the county treasurer for said county, and three years not having expired at the time of the execution and delivery of the said tax-sale certificate by the county clerk to the defendant, Howard, the said county clerk had no authority or power to make such assignment, and such act on his part as such officer gave no interest in and to said land to said defendant, Howard, and the school-land certificate issued to defendant, Howard, being based upon such illegal acts of such county clerk, it, as well as such tax-sale certificate, was and is absolutely void and has no effect.

"(3) The defendant, Howard, having paid the taxes on said land in the sum of \$170, is entitled to receive the same from the county treasurer of said county, in whose hands, as such officer, the plaintiffs deposited for defendant's use.

"(4) That the plaintiffs are entitled to the possession of the said land as such owners, and to a judgment for the sum of \$150 rentals received by defendant, with interest thereon from this date at the rate of six per cent per annum.

"(5) As plaintiffs made a full and complete legal tender of said taxes so paid by defendant, before the commencement of this action, which tender has been kept good ever since, plaintiffs are entitled to the immediate possession of said land.

"(6) That the defendant Howard pay the costs of this suit.

"(7) That the defendant John Nevil has no interest in said land or in this action."

---

Robertson v. Howard.

---

*J. P. Noble, L. H. Wilder, T. F. Garver, and R. D. Garver*, for the appellants.

*John E. Hessin, and Fred Robertson*, for the appellees.

The opinion of the court was delivered by

SMITH, J.: While the evidence afforded by the records and written instruments in the case shows that the trustee's sale of the school-land certificate was very irregular, if not void, we shall consider this case on the questions of law involved, and not review the findings of fact made by the court.

One question involved is whether the sale of the certificate by the trustee in bankruptcy conveyed any interest in the land, or whether it was necessary, in order to divest the certificate holder of his title in the land, to appraise and advertise the land itself for sale and sell it in the method provided by the laws of the United States. No attempt was made to sell the land as such; hence, of course, no steps prescribed by law for the sale of the land were taken.

The certificate is evidence of a contract between the state and the purchaser of the school land, and when such contract is executed and the purchaser makes a payment thereon in execution thereof he becomes the equitable owner of the land, subject to defeasance or forfeiture by noncompliance on his part with the conditions of the contract. The property acquired in the transaction by the purchaser is "land," or "real property," and is not "personal property." (Gen. Stat. 1868, ch. 104, § 1, subdiv. 8; Gen. Stat. 1909, § 9037, subdiv. 8.)

The school-land certificate in question is in every legal aspect like the state normal school-land certificate involved in *Poole v. French*, 71 Kan. 391. In that case this court held in substance that the right acquired by the purchaser was an equitable title to the real estate,

the sale of which is evidenced by the certificate, and that such title is subject to sale on execution. Such interest is also subject to attachment. (*Travis v. Supply Co.*, 42 Kan. 625.) It seems apparent, if the equitable title may be sold on execution or be subject to attachment in one judicial proceeding, that it can not in another forum be sold by a judicial transfer of the certificate; else one court may cause a valid sale of the certificate and another of the land at the same time.

It is contended by the appellees that the sale of the certificate by the trustee is a sale of the land, while they concede that the sale was irregular, and that the law of this state determines the character of the property as real estate, or land.

While the adjudication of bankruptcy conveyed this land and all the property of Hagener to the trustee appointed by the court, the court had no jurisdiction over the land. Its jurisdiction was *in personam*. (*Short v. Hepburn*, 21 C. C. A. 252.) The attempted sale of the land by the trustee is not simply irregular and erroneous; it is void. (*Watson v. Holden*, 58 Kan. 657; *McNutt v. Nellans*, ante, p. 424; *Short v. Hepburn*, supra; *Williams v. Nichol*, 47 Ark. 254; *Casseday v. Norris*, 49 Tex. 613.) The case last cited involved the validity of a sale of land in one county at the courthouse of another county in Texas, under an execution issued upon a judgment rendered by the United States circuit court at Austin, Tex. It was therein said:

"Sales of land made by the United States marshal, under execution, must be made in the county where the land is situated.

"A marshal's sale of land, part of which was in McLennan county, made at the courthouse of Bell county, held void as to that part lying out of Bell county." (Headnote.)

The United States district court for the southern district of Illinois has no jurisdiction in Kansas in bankruptcy, and a trustee appointed by it can only sell real

---

Robertson v. Howard.

---

estate in this state under orders procured from some court having jurisdiction therein. (1 U. S. Comp. Stat. 1901, § 563, subdiv. 18.) So far as conveying any interest in the land in question, the sale of the certificate by the trustee is void.

Upon the adjudication that Hagener was a bankrupt, and upon the qualification of the trustee appointed by the court, the title to all the property of Hagener, including the land in question, vested in a sense in the trustee; and when a bankrupt is fully discharged the title to any of his property which has not been disposed of by the trustee reverts to him. But at all times Hagener had an actual interest in the property, which became a perfect title when it was not needed to pay his indebtedness or when for any reason the trustee was discharged without having used it for that purpose. This interest in the land in question, with the rents thereof, Hagener and wife conveyed to the appellees before he was discharged in the bankruptcy proceeding, and upon his discharge all his rights in and to the property held by the trustee reverted to his grantees. As was said in *Bird v. Philpott*, 69 L. J., n. s., Ch. Div., 487:

"The trustee takes all the bankrupt's property for an absolute estate in law, but for a limited purpose—namely, for the payment of creditors. . . . Subject to that, he is a trustee for the bankrupt of the surplus. . . . The bankrupt has not got the ordinary right of a *cestui que trust* to intervene, until the surplus has been ascertained to exist and all the creditors and interests and costs have been paid. He can not . . . interfere with the administration of the estate in any way, but subject to that, and subject to his noninterference with the administration and with the arrangements of the trustee during the bankruptcy in the due course of the execution of his duty, the bankrupt . . . has a right to the surplus—a right which he can dispose of by . . . deed or otherwise during the pendency of the . . . bankruptcy, even before the surplus is ascertained; although, of course, such dis-

---

Brooks v. Bank.

---

position will be ineffectual unless there turns out to be a surplus eventually." (Page 491.)

(See, also, *In re Evelyn*, 63 L. J., n. s., Q. B. Div., 658.)

If while the bankruptcy proceedings were pending the bankrupt had died intestate there can be no doubt that upon the discharge of the trustee the title to the land would have vested in his heirs. If he had died testate it would have vested in his devisee. No reason is apparent why, where he has conveyed away his interest in his lifetime, the title should not vest in his grantee.

It is not contended that the appellants had a valid tax deed, or its equivalent, to the land. As we have determined that the appellees acquired all of Hagener's interest in the land, it follows that they were entitled to discharge the tax lien of the appellants thereon.

The judgment is affirmed.

---

W. E. BROOKS, *as Trustee, etc., Appellant*, v. THE  
BANK OF BEAVER CITY, *Appellee*.

No. 16,490.

SYLLABUS BY THE COURT.

CHATTEL MORTGAGES—*Validity—Time of Execution—Bankruptcy—Voidable Preference.* An unrecorded chattel mortgage given by a merchant on his entire stock of goods, under which he was permitted to remain in possession of the goods, sell the same without limitation, replenish the stock whenever he might desire and appropriate the proceeds to his own use and benefit, without keeping the new goods apart from the others or paying anything on the indebtedness, and without accounting to the mortgagee for the sales made or the money derived from such sales, is a void instrument; and a later mortgage given by the merchant to the same creditor on the same stock of goods to secure the same debt, which was executed within four months prior to

---

Brooks v. Bank.

---

the bankruptcy of the mortgagor and at a time when he was insolvent, and which was intended as a preference, and where the mortgagee knew that a preference was intended, constitutes a voidable preference under the national bankruptcy act.

Appeal from Reno district court; **PETER J. GALLE**, judge. Opinion filed June 11, 1910. Reversed.

*E. C. Wilcox*, for the appellant.

*W. G. Fairchild*, for the appellee; *H. S. Lewis*, of counsel.

The opinion of the court was delivered by

**JOHNSTON, C. J.**: This action was brought by **W. E. Brooks**, as trustee of the estate of **F. P. Madison**, a bankrupt, against the Bank of Beaver City, to set aside a preference obtained through two mortgages executed by **F. P. Madison** to the bank, under which the bank took and appropriated mortgaged goods of the value of \$1571. The petition alleged that on March 15, 1907, Madison was engaged in a general merchandise business in Beaver City, and that upon that date a bankruptcy proceeding was instituted against him, on the ground that he had executed the two mortgages mentioned, one dated March 12, 1907, and the other March 15, 1907, while he was in an insolvent condition, and that it was done with the intent to prefer the bank over other creditors. It was alleged that at the time of obtaining the mortgages and the possession of the goods the bank and its officers knew that Madison was insolvent and intended to prefer the bank over others of his creditors. Later, and on April 19, 1907, he was duly declared a bankrupt. In its answer the bank alleged that on September 13, 1906, it made a loan to Madison of \$1017.42, and to secure the payment of the debt took a chattel mortgage on his stock of goods; that on March 12, 1907, the whole of the debt and interest being due, the bank obtained a new note for the amount of the debt, and also another

---

Brooks v. Bank.

---

chattel mortgage from Madison, under which it took possession of the stock, and that upon the 15th day of March, 1907, still another chattel mortgage was executed for the same indebtedness. It further alleged that both of the mortgages of March, 1907, were renewals of the prior mortgage of September, 1906, and that the original mortgage of 1906 was given for a present consideration, more than four months before the bankruptcy proceedings were begun, and was not given in fraud of the bankruptcy act.

According to the testimony the bank actually loaned money to Madison in 1906 and took a mortgage on his stock of goods, but this mortgage was never recorded, and the bank did not take possession of the goods under it. On the other hand, it allowed Madison to continue in possession of the goods, sell them in the usual course of trade, buy other goods to replenish the stock, without keeping the new goods separate from those mortgaged and without accounting to the bank for the proceeds of the sales made. Madison testified that between September 13, 1906, and the execution of the mortgage on March 12, 1907, he bought goods at wholesale houses, put them in his store and carried on a regular retail business, replenishing his stock whenever he saw fit to do so, and using the money derived from the sales in his business and in living expenses as he had done prior to the execution of the mortgages. He stated that the stock was kept up so that it was of about the same value as when the first mortgage was given, but that it did not consist of the same goods, and that it was impossible to tell how many of the mortgaged goods remained in stock when the mortgage of March 12, 1907, was given. It also appears that prior to the giving of the mortgages of March, 1907, Madison was in fact insolvent, and that on March 12, 1907, he sent a message to the cashier of the bank telling that officer of his financial condition; that he was unable to run the store any longer; that a representative of one of



---

Brooks v. Bank.

---

his creditors was then in town looking after its claim, and he advised the cashier to take steps to protect the bank. Acting on this information the bank procured Madison to make a note for the debt, and to execute a mortgage on the entire stock of goods, after which the bank took possession. For some reason the bank took another mortgage on March 15, 1907, which was substantially the same as the one given three days before. At the end of the trial the court refused to set aside the mortgages, and gave judgment in favor of the bank.

The mortgages of 1907, taken by themselves, constituted voidable preferences. They were given and recorded within four months before Madison was adjudged a bankrupt, for a preëxisting debt to the bank, whose officers knew of Madison's insolvency and that the mortgages were intended as preferences. The bank took possession of the goods under the mortgages with full knowledge of the financial condition of Madison, and upon his suggestion that he could not meet his obligations and that therefore the bank should take the mortgages and the goods to meet its claim. (National Bankruptcy Act of 1898, §§ 60, 67e, 30 U. S. Stat. at L., ch. 541; *Sherman v. Luckhardt*, 67 Kan. 682; *Brandenburg, Bankr.*, 3d ed., § 962; *Collier, Bankr.*, 7th ed., p. 666.)

That the mortgages of March, 1907, were acts of bankruptcy and preferences was decided in the bankruptcy proceeding, but apart from that adjudication it is clear from the evidence that, considered by themselves, they came within the condemnation of the bankruptcy act. It is contended, however, that these mortgages were but renewals of the mortgage of September 13, 1906, which, as we have seen, was given to secure the payment of a loan made at that time. This mortgage, it appears, was never recorded, and the bank did not take possession of the goods under it. On the matter of recording, it is contended in behalf of the bank

that under the law of Oklahoma the recording of the mortgage was not required and therefore not essential to the validity of the mortgage. The trustee contends that the law of Oklahoma as it existed at the time the transactions were had and when this action was begun was to the effect that an unrecorded mortgage was void. This appears to have been the interpretation given the mortgage provision by the supreme court of Oklahoma until the territory became a part of the state of Oklahoma, but since the territory of Oklahoma and Indian Territory were organized into a state the supreme court of the state has adopted the rule which prevailed in Indian Territory and decided that an unrecorded mortgage is not invalid. It is unnecessary, however, to determine which rule of law shall be applied to the transactions involved in this proceeding. Apart from the omission to record the mortgage of 1906, it is clear that it was not a valid lien. It was no more than an ineffectual attempt to acquire a lien. Nothing was done by the bank by which creditors and those dealing with Madison could ascertain that the bank claimed a lien on the goods. There was neither actual nor constructive possession of the goods by the bank. The ownership and control by Madison was not disturbed, and no limitations were placed upon his use or appropriation of the proceeds. Although it contained such a provision as is usual in chattel mortgages, to the effect that no part of the mortgaged property should be sold or disposed of without the consent of the mortgagee, it provided that Madison should retain possession and control and have the ordinary use and benefit of the property, and it was the understanding between the parties that the mortgagor should sell at will and buy again as he might desire. He was not required to account for what was sold nor apply the proceeds on the debt owed to the bank. No provision was made that goods purchased after the mortgage was given should be kept apart from those that were mortgaged.

---

Brooks v. Bank.

---

The cashier of the bank frankly testified that he knew Madison was selling the goods, replenishing the stock, applying nothing on his indebtedness, and that the plan Madison was pursuing was satisfactory to the bank.

In *Implement Co. v. Schultz*, 45 Kan. 52, the mortgagor was allowed to continue in possession of a stock of goods, selling them as before, with the knowledge and acquiescence of the mortgagees, having the same control over the goods as he had before the mortgage was executed, and applying the proceeds at his own discretion, and it was held that such a mortgage is as a matter of law fraudulent and void. In a later case, where a mortgagor was permitted to sell the mortgaged property without limitation, and no provision was made as to what should be done with the proceeds, the mortgage was held to be void as against creditors. (*Rathbun v. Berry*, 49 Kan. 735.) In Oklahoma, where this transaction took place, the supreme court held that an arrangement which gave a mortgagor possession of a stock of goods with the right to convert the goods into money and appropriate the money as he pleased was a nullity. It was there said:

“Such a privilege is against the policy of the law, and wherever stocks of merchandise have thus been mortgaged and the privilege of appropriation by the mortgagor to his own use has been thus permitted by the terms of the mortgage, the decisions of the courts of this country have condemned them with almost entire unanimity, and the instrument itself has been as uniformly held to be fraudulent and void as a matter of law, irrespective of the question as to whether any fraud or fraudulent intent did, in fact, exist.” (*Little Company and Horsfall v. Burnham, Hanna, Munger & Co.*, 5 Okla. 283, 293.)

The arrangement by which the mortgagors were allowed to sell the goods as their own, without accounting to anyone for them, and to appropriate the money derived from the sales to their own purposes, is incompatible with the purpose of a mortgage lien. As was said in *Robinson v. Elliott*, 89 U. S. (22 Wall.) 513,

---

Brooks v. Bank.

---

526, "a mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose." (See, also, *Means v. Dowd*, 128 U. S. 273; *Blakeslee v. Rossman*, 43 Wis. 116; *Lang v. Lee, &c.*, 3 Rand. [Va.] 410.)

The conceded facts as to the plans and purposes of Madison and the bank are sufficient to show that the mortgage was without validity, and even the recording of the same would not have cured the illegality of the attempted transfer. The taking of possession of the goods by the bank in March, 1907, did not validate the mortgage of 1906. It appears, however, that possession was not taken under that mortgage, nor until after the execution of the one dated March 12, 1907, and it, as we have seen, was executed only a few days before the bankruptcy proceeding was begun. The undisputed facts show clearly enough that the taking of possession of the goods by the bank under the mortgages constituted a voidable preference. (*Shale v. Bank*, post.)

The judgment is reversed and the cause remanded, with the direction to enter judgment in favor of appellant.

KATE CASPAR, *Appellee*, v. WILLIAM LEWIN *et al.*,  
*Appellants*.

No. 16,504.

SYLLABUS BY THE COURT.

1. **FACTORY ACT**—*"Manufacturing Establishment."* Under section 7 of the factory act (Laws 1903, ch. 356; Gen. Stat. 1909, § 4682), besides certain named establishments any other establishment is a "manufacturing establishment" wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incomplete state or condition, are converted into a new or improved or different form.
2. ——— *Same.* An establishment wherein railroad iron, old stoves, old waste iron and scrap iron of every description is cut into lengths known as grade No. 1, grade No. 2, and busheling scrap, by means of machines known as alligator shears and operated by power, to meet standing specifications of mills which purchase the product, is a "manufacturing establishment" within the meaning of the factory act.
3. ——— *Construction*—*Statute Not Adopted from Another State.* None of the sections of the factory act is a transcript from the law of any other state and consequently had not been given a settled and definite meaning by the highest court of any other state when the statute was enacted.
4. ——— *Duty to Safeguard Machinery Not Limited to Workmen Engaged in "Ordinary" Duties Only.* Section 4 of the factory act (Laws 1903, ch. 356; Gen. Stat. 1909, § 4679), relating to safeguards for machinery and appliances, is not limited in its application to workmen engaged in their ordinary duties only. It is designed to protect persons employed or laboring in manufacturing establishments while in the performance of any duty, whether ordinary and general or exceptional and occasional.
5. ——— *Common-law Duty of Master Supplanted by Statutory Duty.* The factory act ignores the common-law duty resting on the factory owner or operator to exercise reasonable care to prevent foreseeable injuries and establishes a statutory measure of prudence, by making specific precautionary requirements relating to specified places, structures and appliances; and in an action founded on the act for damages consequent upon injuries to an employee acting in the scope of his duty, caused by the absence of a prescribed safeguard, it is no defense that the injury could not, with reasonable prudence, have been anticipated.

---

Caspar v. Lewin.

---

6. ——— *Statute Can Not be Evaded by Rules Relating to Use of Machinery.* The protection of the factory act extends only to persons acting within the scope of some employment or labor. But the factory owner can not evade the requirements of the act, as that belt shifters shall be provided, by means of rules or instructions relating to the use of appliances, as that belts shall be shifted only while the machinery is not in motion.
7. ——— *Contributory Negligence of Injured Employee No Defense to Action under the Statute.* The civil action for damages authorized by the factory act is not a common-law action, but is a statutory remedy for the enforcement of a positive duty enjoined by law in the interest of the public welfare, and the contributory negligence of the injured employee or laborer is not a defense to such an action. The first paragraph of the syllabus of *Madison v. Clippinger*, 74 Kan. 700, is overruled.
8. ——— *Constitutionality—Police Regulation.* The factory act falls within the legitimate scope of the police power of the state, and the remedy prescribed for its enforcement is not obnoxious to either the state or the federal constitution.
9. ——— *Evidence Sufficient to Establish Liability in the First Instance.* Under section 6 of the act (Laws 1903, ch. 356; Gen. Stat. 1909, § 4681) it is sufficient, in order to establish liability, for the plaintiff to prove, in the first instance, that death or injury resulted in consequence of failure to provide the required safeguards, or that failure to provide such safeguards directly contributed to such death or injury, and it is not necessary for the plaintiff to go further, in those cases where the subject is pertinent, and prove the practicability of such safeguards. The third paragraph of the syllabus of *Henschell v. Railway Co.*, 78 Kan. 411, is overruled.

Appeal from Wyandotte court of common pleas.  
HUGH J. SMITH, judge. Opinion filed June 11, 1910.  
Affirmed.

*Jules C. Rosenberger, Clyde Taylor, and Kersey Coates Reed*, for the appellants.

*John T. Sims, and Angevine, Cubbison & Holt*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: Tony Caspar was an employee of the defendants, and while at work for them in their establishment suffered injuries which resulted in his death. The plaintiff, his widow, as administratrix of his estate, sued the defendants for the consequent damages in an action founded upon the factory act. She recovered, and the defendants appeal.

The act referred to is chapter 356 of the Laws of 1903 (Gen. Stat. 1909, §§ 4676-4683), the title of which reads as follows:

"An act requiring safeguards for the protection of all persons employed or laboring in manufacturing establishments, and providing civil remedies for all persons so engaged, or their personal representatives, in cases where any such person may be killed or injured while employed or laboring in any manufacturing establishment which is not properly provided with the safeguards required by this act."

Section 1 requires elevators, hoisting shafts and well-holes to be inclosed or secured. Section 2 provides that stairways shall be equipped with handrails, and shall be secured at sides and ends, that certain doors shall open outward, and that such doors shall be kept unfastened. Section 3 provides for fire escapes. Section 4 provides for the guarding of dangerous machinery and appliances. Sections 5 and 6 relate to remedy. Sections 7 and 8 are devoted to definitions of terms. The act relates to manufacturing establishments only, as defined in section 7, which reads as follows:

"Manufacturing establishments, as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and, in addition to the foregoing, any other kind or character of manufacturing establishment, of any nature or description whatsoever, wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incom-

plete state or condition, are converted into a new or improved or different form."

The defendants claim they were not owning or operating a manufacturing establishment, and that the deceased was not employed or laboring in such an establishment when he was injured.

The defendants' business consists principally in buying and selling scrap iron, and converting it into shape so that mills can use it without further handling. They buy on the market iron of all grades, including railroad iron, old stoves, old waste iron and scrap iron of any description. Consignments come to them mostly by train from the surrounding country. The iron is unloaded at their yard and graded—that is, sorted out. Some of it they sell as it is—that is, it requires no cutting. Some of it must be cut to suit the requirements of purchasers, as appears from the following testimony of William Lewin, one of the defendants:

"Ques. Others you would cut up more for a matter of convenience in selling, would you, and handling? Ans. No, it would—we would have to cut it up according to specifications of the mill.

"Q. I say, whoever you were selling it to, you would sell it in whatever sizes they wanted it? A. Yes, we did that for their convenience.

"Q. You stated . . . that you cut up iron there according to the specifications of the mill? A. Yes, sir.

"Q. Will you just explain to us what you mean by that? A. Well, iron is graded in different grades. There is grade No. 1, and No. 2, and a grade called busheling scrap. Grade No. 2 must be cut all under eight inches. Grade No. 1 must be all over eight inches, and busheling scrap is this sheet iron, cut eight inches and under.

"Q. As I understand the situation, then, you got an order from the mill to cut certain lengths; that is what you were doing? A. Standing specifications.

"Q. Well, specifications from the mill? A. Yes, from the mill.

"Q. That is the person to whom you sold the iron? A. Well, not direct—yes, some of it was sold to the



mill direct, while others went through the hands of brokers.

"Q. Well, in any event, you were required, in order to sell it, to cut it to certain lengths? A. Not necessarily; we can sell it the way it is without cutting it.

"Q. I know, but you do cut it certain lengths? A. We did.

"Q. Cut it certain lengths to supply a demand for it? A. A good portion of it; yes."

The iron was cut by a machine called "alligator shears," equipped with a loose and a tight pulley. A line shaft, probably 100 feet long, was supported near the top of the building in which the shears were located. On this shaft was a pulley, and power was transmitted from the pulley on the shaft to the pulleys on the machine by a belt. Three pairs of shears, operated in this manner, were in use in the establishment.

It is not disputed that the iron, as it came into the yard and after it was sorted out, was a kind of material capable of being wrought into the form of a manufactured product, and so falls within the purview of section 7. The word "raw" is a relative term, and means simply not yet changed by some process of treatment or fabrication. The words "unfinished" and "incomplete" likewise refer to a state or condition not yet attained, and mean simply not fully fashioned to meet some design. Consequently, before passing through the shears the iron was in a raw, unfinished and incomplete state and condition, considered with reference to the needs and demands of the mill. By means of the shears the iron was converted into a new and different form. It lost its old, nondescript character, and acquired the new quality of uniformity in length. It was also converted into an improved form. It was changed from junk into milling iron of grade No. 1, grade No. 2, and busheling scrap. This conversion was accomplished by means of machinery especially designed for the purpose and not at all of a

rudimental type. It was accomplished according to definite specifications and to meet a specific demand. It was accomplished in a fixed and settled place of business, equipped and maintained for the purpose, and when it was accomplished the iron in its new form became the completed and finished product of that establishment.

It is clear that every element of the statutory definition of a manufacturing establishment is present in the foregoing facts, unless it be otherwise from the following circumstances: Whoever acted as draftsman for the legislature collocated the words of the act so that they say a manufacturing establishment includes a manufacturing establishment wherein the conversion described takes place. The defendants insist that, according to the language of the act, it is not enough that an establishment be one where raw materials are converted into new forms; that besides this such an establishment must be something more, namely, a manufacturing establishment; and that the meaning of the term "manufacturing establishment" must be sought for outside the act itself.

The only purpose of incorporating section 7 in the act was to preclude a roving quest for the meaning of words. The section was designed to make the meaning of the term "manufacturing establishment" as it had been used in the previous sections so clear that there could be no misunderstanding of just what establishments were included. In an effort to be explicit the draftsman violated the law of logic which forbids a definition to contain the name defined, and was guilty of the ancient fallacy, "*circulus in definiendo*"—"a circle in defining," whereby the definition ends where it started. But the intention is unmistakable, as a little scrutiny of the structure of the section will show. It first includes by name a number of establishments, some of which may not be popularly known or regarded as manufactories — smelters, oil refineries, cement

---

Caspar v. Lewin.

---

works, mills of every kind, machine shops and repair shops. By force of the definition these all become manufacturing establishments. Then all other manufacturing establishments were included by the clause, "and in addition to the foregoing any other kind or character of manufacturing establishment of any nature or description whatsoever." Then, in order that the full scope of the act might not be mistaken, the broadest possible definition of a manufactory was added—"[a place] wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incomplete state or condition, are converted into a new or improved or different form." Although somewhat elaborate in phraseology, in essence and in substance this is the universally inclusive definition of a manufactory which is found in the dictionaries, encyclopedias and works on economics.

The argument of the defendants may be met in another way. Since the legislature gave a section of the act to a definition of the term "manufacturing establishment," it may be assumed it did not intend to leave that term undefined. The introduction of the word "manufacturing" in the part of the section beginning "any other kind or character of manufacturing establishment" could add nothing, because, being the term to be defined, it could not make its own meaning manifest. If given any force it would make all that follows jargon. Consequently the word should be disregarded, and the statute should be read as follows: "And, in addition to the foregoing, any other kind or character of establishment of any nature or description whatsoever, wherein," etc.

The process of manufacturing may be very complicated or it may be simple in the extreme. There are primary and secondary stages, but the legislature has said that all establishments for the modification of natural objects to adapt them to human needs are embraced in the act. Very clearly that of the defendants

---

Caspar v. Lewin.

---

is included. It is all the more easy to say this because it is apparent from the description given that the defendants operate what in all essential respects fulfills the popular notion of a mill for the production of a staple article. Besides this, the interpretation given the act serves to carry out the remedial and humanitarian purpose which it seeks to accomplish—the protection of working people from mutilation, physical deformity, physical pain, mental anguish and death, occasioned by the absence of practicable safeguards from the environment of their toil.

Section 4 and a portion of section 5 of the statute read as follow:

“SEC. 4. Every person owning or operating any manufacturing establishment in which machinery is used shall furnish and supply for use therein belt shifters, or other safe mechanical contrivance, for the purpose of throwing on or off belts or pulleys; and wherever it is practicable machinery shall be operated with loose pulleys. All vats, pans, saws, planers, cog gearing, belting, shafting, set screws and machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified.” (Gen. Stat. 1909, § 4679.)

“SEC. 5. If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages.” (Gen. Stat. 1909, § 4680.)

On the day of the casualty the decedent undertook to start the shears in obedience to an order from the fore-

man of the establishment to do so. No belt shifter or other mechanical device was provided for throwing the belt on the shaft pulley. This pulley was located some nine feet or more above the floor of the building. Sometimes the belt was thrown on with a stick. Sometimes a ladder was climbed and the belt was put on by hand. On this occasion the decedent used the ladder. The shaft terminated some two or three feet from the pulley, in a burred end, which was not boxed or otherwise guarded. The ladder broke, the shaft was revolving rapidly, the decedent's clothing became engaged with it, and he was killed. Besides being used for the purpose of putting on the belt, the ladder was employed to reach the shafting for the necessary purpose of oiling it. There was no dispute about any of these facts, except the distance of the shafting from the ground, which is not important. It was beyond the possibility of contact with men working at the shears. There was testimony that the ladder was used to oil the shafting and to put on the belt only when the machinery was not in motion. The court did not regard this testimony as material, under the circumstances, and instructed the jury to the effect that the plaintiff should recover if the provisions of the statute relating to belt shifters and safeguards were not observed and the absence of the required precautions caused or directly contributed to cause the injury. The defendants contend that the shafting was located where it was not dangerous to employees while engaged in the ordinary discharge of their duties, and that the employer is not required to guard against unusual or unexpected exposure to danger. The argument in support of this contention is that the statute was taken from New York, that at the time of its adoption here the New York statute had been construed according to the defendants' view, and that independently of its origin the statute does not contemplate liability for that which could not reasonably be foreseen.

Factory legislation is a matter of continuous growth and change. It began in England with the act passed in 1802 (42 Geo. III, ch. 73), which provided for the cleansing and ventilation of cotton mills and factories, and for the clothing, hours of labor and religious education of apprentices employed in such establishments. The factory and workshop act of 1901 (1 Edw. VII, ch. 22) contains one hundred and sixty-three sections and embraces a great variety of subjects. The growth of this legislation is thus described in the introduction to the eleventh edition (1909) of Redgrave's Factory Acts:

"During the first three-quarters of the nineteenth century the course of legislation was from hand to mouth. Whenever new regulations were required, or defects appeared in old ones, or fresh classes of workers seemed to need protection, an act of parliament was passed *ad hoc*, with the result that in 1875 the law as to factories and workshops consisted of a perfect chaos of regulations contained in nineteen different statutes. In that year the whole subject was considered by a royal commission, whose report, published in 1876, led to the factory and workshop act, 1878, by which all the parts of the puzzle were fitted together in logical sequence, with such alterations as were deemed desirable.

"No sooner, however, had that act been passed than further extensions of the law were found necessary. Additional legislation took place in 1883, 1889, 1891, 1895 and 1897, which restored the old state of chaos and rendered it necessary to do the work of 1878 over again. This was done by the act of 1901, which (subject to the alterations which it in its turn has received, in 1903, 1906 and 1907) is, therefore, a complete code of the law relating to factories and workshops." (Page xxi.)

The experience of England has been paralleled in this country. A beginning in factory legislation was made by the Massachusetts act of April 16, 1836, "to provide for the better instruction of youth employed in manufacturing establishments." (See Laws Mass. 1842, ch. 60, § 1.) In 1897 the section of the New York law

which relates to the protection of employees operating machinery was imbedded in a labor code which covers thirty-nine pages of the statute book, and three more pages are filled with a schedule of laws repealed by the act. (Laws N. Y. 1897, ch. 415.) The chapter referred to has since been amended a number of times.

The first provision for safeguarding dangerous machinery was made by the legislature of Massachusetts in 1877, in an act which reads in part as follows:

"The belting, shafting, gearing and drums of all manufacturing establishments, when so located as to be, in the opinion of the inspectors hereinafter mentioned, dangerous to employees while engaged in their ordinary duties, shall be, as far as practicable, securely guarded." (Acts & Res. Mass. 1877, ch. 214, § 1.)

The subject of guarding vats and pans was introduced by an act of the Wisconsin legislature which took effect May 2, 1887, section 2 of which reads as follows:

"Every stationary vat, pan or other structure with molten metal or hot liquids shall be surrounded with proper safeguards for preventing accidents or injury to those employed at or near them. All belting, shafting, gearing, hoists, flywheels, elevators and drums of manufacturing establishments, so located as to be dangerous to employees when engaged in their ordinary duties, shall be securely guarded or fenced so as to be safe to persons employed in any such place or employment." (Laws Wis. 1887, ch. 549.)

Belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys first appeared in the New York act of May 25, 1887, and such appliances were then required to be automatic. (Laws N. Y. 1887, ch. 462, § 11.) In 1890 this section of the law was amended in many particulars to read as follows:

"It shall be the duty of the owner of any manufacturing establishment, or his agents, superintendent, or other person in charge of the same, to furnish and supply or cause to be furnished and supplied therein, in the

discretion of the factory inspector, or of the assistant factory inspector, or of a deputy factory inspector unless disapproved by the factory inspector, where machinery is in use, belt shifters or other safe mechanical contrivances, for the purpose of throwing on or off belts or pulleys; and wherever possible machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing and machinery of every description therein shall be properly guarded. Exhaust fans shall be provided for the purpose of carrying off dust from emery wheels and grindstones and dust-creating machinery therein. No person under eighteen years of age and no woman under twenty-one years of age shall be allowed to clean machinery therein while in motion." (Laws N. Y. 1890, ch. 398, § 12.)

In the labor law of 1897 (Laws N. Y. 1897, ch. 415) article 6 is devoted to factories, and besides the matter contained in section 81, which relates to the protection of employees operating machinery, includes regulations concerning the employment of minors, hours of labor of minors, the inclosure, operation and inspection of elevators and hoisting shafts, stairways and doors, fire escapes, the whitewashing or painting of walls and ceilings, the size of rooms and air space, ventilation, the reporting of accidents, washrooms and water-closets, time for meals, and the inspection of factory buildings. Besides prohibiting the removal or the rendering ineffectual of safeguards, except for repair, providing for exhaust fans to carry away dust, prohibiting the use of unguarded machinery on notice by the inspector, providing for lights in halls leading to workrooms, and prohibiting the cleaning of machinery in motion by males under eighteen and females under twenty-one, section 81 contains the following regulations material to this inquiry:

"The owner or person in charge of a factory where machinery is used shall provide, in the discretion of the factory inspector, belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or



---

Caspar v. Lewin.

---

pulleys. Whenever practicable, all machinery shall be provided with loose pulleys. All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery, of every description, shall be properly guarded." (Laws N. Y. 1897, ch. 415.)

This act took effect June 1, 1897. It was amended in 1899 in some respects not now of consequence. (Laws N. Y. 1899, ch. 192, § 81.)

In March, 1897, a statute of the state of Indiana became effective which followed the New York law of 1890, and required mechanical substitutes for belt shifters to be "safe" and loose pulleys where "possible." (Laws Ind. 1897, ch. 65, § 8.) Mechanical contrivances for the purpose of throwing belts were required to be "safe" in Iowa (Laws Iowa, 1902, ch. 149, § 2), and in Minnesota (Laws Minn. 1893, ch. 7, § 21). In Pennsylvania "automatic shifters or other mechanical contrivances" were necessary. (Laws Pa. 1893, ch. 244, § 8.) In Ohio shifters for "shifting belts and poles and other appliances for removing and replacing belts on single pulleys" were sufficient. (Laws Ohio, 1900, p. 42, § 1.) In Connecticut (Acts Conn. 1887, ch. 152, § 3), New Jersey (Laws N. J. 1885, ch. 168, § 3) and West Virginia (Acts W. Va. 1901, ch. 19, § 1) machinery was required to be "securely guarded," instead of "properly guarded," as in Indiana, Iowa and New York. In Wisconsin the provision was "securely guarded or fenced." (Laws Wis. 1887, ch. 549, § 2.) In Massachusetts the expression was "securely guarded." (Laws 1887, ch. 214, § 1.) In Minnesota the phrase ran "properly guarded, fenced or otherwise protected." (Laws Minn. 1893, ch. 7, § 1.) In Missouri the words were "safely and securely." (Laws Mo. 1891, p. 160, § 3.) In Pennsylvania (Laws Pa. 1893, ch. 244, § 8) and Rhode Island (Laws R. I. 1894, ch. 1278, § 6) "proper safeguards" were required.

The protection of factory acts was expressly limited to employees engaged in their "ordinary duties" in the

states of Connecticut, Massachusetts, Missouri, New Jersey and West Virginia. This limitation did not appear in the laws of Indiana, Iowa, Minnesota, New York, Pennsylvania, Washington and Wisconsin. The original Wisconsin law has been quoted. In the revision of 1898 the limitations upon the classes of employees entitled to the protection of safeguards were "industriously by amendment dropped" (Marshall, J., in *Miller v. Kimberly & Clark Co.*, 137 Wis. 138, 143), and the law was made to read as follows:

"The owner or manager of every place where persons are employed to perform labor shall surround every stationary vat, pan or other vessel into which molten metal or hot liquids are poured or kept with proper safeguards for the protection of his employees, and all belting, shafting, gearing, hoists, flywheels, elevators and drums therein, which are so located as to be dangerous to employees in the discharge of their duty, shall be securely guarded or fenced." (Stat. Wis. 1898, § 1636j.)

In Ohio the owners and operators of all factories and workshops were required to make suitable provision "to prevent injury to persons who may come in contact with any such machinery." (Laws Ohio, 1900, p. 42, § 1). In Rhode Island belting and gearing were required to be provided with proper safeguards, and if vats, pans or structures filled with molten metal or hot liquid were not surrounded with proper safeguards "for preventing accident or injury to those employed at or near them" (Laws R. I. 1894, ch. 1278, § 9) the factory inspector might require alterations or additions.

The dangerous location of machinery was made a feature in Connecticut, Massachusetts, Minnesota, New Jersey, Missouri, Rhode Island and West Virginia; the practicability of guards in Connecticut, Massachusetts, Minnesota and New Jersey. In Missouri and West Virginia guards were required where possible.

Different methods were employed in different states to secure compliance with their factory acts. In New York violations of article 6 of the code of 1897 were made punishable as misdemeanors, with increasing penalties for repeated infractions. (Laws N. Y. 1897, ch. 416, § 384l.) No civil remedy was provided.

The statutes of all the states have not been compared, and all the differences of those which have been examined have not been noted. The foregoing, however, is sufficient to show the confused condition of the statute law of this country on the subject of protection to employees in factories when the legislature of this state approached the subject in 1903. It was not able, if it had been so inclined, to select an act, made to order, from the stock supplied by other states. It desired to cover a few matters in an effective way, but found no single statute and no single section of any statute which it could appropriate. Consequently it chose its own subjects, and framed its own regulations in its own way. Section 81 of the New York code (Laws N. Y. 1897, ch. 416; Laws N. Y. 1899, ch. 192) was too broad in its scope, too weak and indefinite in some of its requirements, and was unsuited for adoption because of the functions of the factory inspector. Its list of appliances was not accepted in its entirety. Substitutes for belt shifters were required to be safe. The items "cogs, gearing," were contracted into "cog gearing." Vats, etc., and machinery were required to be properly, that is, suitably, according to the nature of the appliance, and safely guarded, but this need be done only where practicable. The protection of the act was extended without limitation to "any person employed or laboring in any manufacturing establishment." It was made the duty of factory owners and operators not merely to provide the safeguards specified, but to keep their establishments furnished with them, and a right of

---

Caspar v. Lewin.

---

action was given in every case where the absence of the required safeguards caused or directly contributed to death or injury. From all this it is plain that the statute is unique, was so created by the legislature, and is not a transcript of the law of New York or of any other state. The result is it has not been given a settled and definite meaning by the highest court of New York, and the chief argument of the defendants may be laid aside.

Considered merely as a precedent, the New York case (decided in April, 1900) relied upon by the defendants was this: The plaintiff was employed to attend a machine known as a clinker crusher. Overhead some fifteen or eighteen feet was a revolving shaft, with a collar to prevent end thrust, from which projected a set screw. Under the shaft a platform was constructed for the purpose of affording access to a bearing immediately adjoining the set screw, which needed to be oiled. The platform was reached by means of a ladder. The plaintiff ascended the ladder to the platform to oil the bearing, the inevitable occurred, his sleeve caught in the set screw and he was seriously injured. After quoting the statute the court proceeded to emasculate it in the following way:

"The manifest purpose of the enactment was doubtless to give more force to the existing rule that masters should afford a reasonably safe place in which their servants are called upon to work. We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to the servants whose duty required them to work in its immediate vicinity should be properly guarded, so as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen. (*Cobb v. Welcher*, 75 Hun, 283.) In this case, as we have seen,

---

Caspar v. Lewin.

---

the shafting was located from fifteen to eighteen feet above the floor of the factory, and the collar containing the offending screw was at one end of the building, high above and out of the reach of the servants who were engaged in operating the machinery below. It could only be approached by a ladder, and the only necessity of approaching it at all was for the purpose of oiling the bearing under the shafting. It does not appear that any accident of this character had ever happened before at this bearing, or that it had ever occurred to any of the persons operating the factory that such an accident was possible or liable to occur. The statute does not attempt to specify how machinery shall be guarded otherwise than as 'properly guarded.' The necessity for the guard, and the character and description of the guard, must, of necessity, depend upon the situation, nature and dangerous character of the machinery, and in each case becomes a question of fact." (*Glens Falls P. C. Co. v. Travelers' Ins. Co.*, 162 N. Y. 399, 403.)

Taking up the argument of this opinion step by step, it may be observed that it proceeds upon precisely the same lines as if the statute did not exist. The practicability of safeguards for dangerous machinery does not depend upon the size of the factory or the number of pieces of machinery inside of it, but upon the nature of each machine. The question is, Is the machine or appliance of such a nature that it is practicable to deprive it of its homicidal attributes and not destroy its usefulness? If so it ought to be guarded, and all such pieces ought to be guarded, although a great many are assembled in one large building. The shaft bearing had to be oiled, just as the crusher had to be operated, and the ladder and platform were provided for the purpose of conducting the oiler to the necessary place. The oiler was obliged to do the work of oiling the bearing in the "immediate vicinity" of the set screw in the revolving shaft. The statute named set screws and shafting as appliances to be properly guarded, so as to minimize the danger attending the labor of the oiler while at work in their immediate vicinity. It did not require super-

human powers and would not have caused brain fog to foresee that a set screw projecting from a revolving shaft threatens danger to an employee obliged to work immediately adjoining them. The legislature had that much prevision. That body put set screws and shafting in the category of dangerous devices to be properly guarded when in proximity to places where labor must be performed, and thereby established the measure of prudence to be exercised. The location of the shafting had nothing to do with the case. It made no difference whether the shafting were brought down to the floor or the floor were taken up to the shafting by means of the ladder and the platform. Of course the shafting was out of reach of persons operating machinery on the floor and having no business with it, but it was not out of reach of the oiler, who did have regular business with it. Since it was imperative that the set screw in the shafting should be approached, it was immaterial whether it were approached on a platform reached by a ladder or on the floor level. True, the only necessity for approaching the dangerous appliance was to oil the bearing, but that was a necessity just as much as attending to the crusher below, and whenever the operation was performed it was attended with danger. It is indeed true that a human being must be mangled before it occurs to some factory owners that a set screw in a rapidly revolving shaft is dangerous to the person who must work near it, and that is the reason why the statute required it to be guarded. There was no dispute about the situation, nature and dangerous character of the set screw. No attempt was made to meet the peremptory terms of the statute and provide a guard for it. That it was the plaintiff's duty to bring himself in proximity to it was not questioned. Consequently there was nothing left but to declare that a statutory duty had been violated. No reasons other than those considered having been stated in support of the decision, this court is unable to follow it.

---

Caspar v. Lewin.

---

The Glens Falls case was followed in 1905 by that of *Dillon v. National Coal Tar Co.*, 181 N. Y. 215. Shafting was located fourteen or fifteen feet above the factory floor. The foreman required a steam fitter to take down some pipe above the shaft while the machinery was running. The steam fitter worked on a ladder placed against the pipe. His jacket was caught by the shaft, he was whirled around, thrown to the floor, and severely injured. The court said:

"As the shaft which caused plaintiff's injuries was elevated fourteen or fifteen feet above the floor of the defendant's factory, and could be reached only by the use of a ladder, the defendant can not be charged with negligence under the factory act in failing to properly guard it. (*Glens Falls P. C. Co. v. Travelers' Ins. Co.*, 162 N. Y. 399.) The only ground upon which the defendant can be held liable, if at all, is that it failed in its duty to properly instruct the plaintiff before he was directed to take down the pipe upon which he was at work when injured. If the danger to be apprehended by coming in contact with the shaft was as open, obvious and apparent to the plaintiff as it was to the defendant, the latter was under no duty to instruct the former in this regard, for in that event the risk was one which he voluntarily assumed." (Page 219.)

With the utmost respect to the very learned court of appeals of New York, it is submitted that such rulings simply fritter away serious efforts on the part of the legislature to secure factory workers against the barbarities of an industrial system which has been conducted with amazing prodigality of human life and limb. It may be conceded that one way of preventing injury from shafting, set screws and other appliances is to locate them out of reach. But they are not out of reach whenever a workman's duty, in the course of his employment, takes him to them. Whenever such an occasion arises the statutory duty to interpose safeguards between the workman and danger arises. Dillon was obliged to work where unguarded shafting in motion would seize his clothing. The legislature had

his situation in mind when the statute was framed. The foreman had the choice of stopping the machinery or running the risk of inflicting a personal injury in violation of law. He chose the latter course, the result followed which the legislature had foreseen and had tried to circumvent, and the injured man ought to have recovered.

The court's views have been indicated far enough to show that it is not inclined to read into the statute any words which would limit its application to workmen engaged in ordinary duties only. The Missouri court of appeals says this must be done to make any factory act reasonable. (*Strode v. Columbia Box Co.*, 124 Mo. App. 511, 518.) The Missouri statute contains such a limitation, and, as pointed out above, the statutes of other states are careful to incorporate similar provisions. The legislature had these precedents before it when framing the law of this state and rejected them, thereby indicating its view of what is reasonable. The conduct of the Wisconsin legislature has been recited. Interpreting the amended statute the supreme court of that state said:

"It is beside the case to argue, as counsel for appellant do in their brief, that the shaft, at the point where the injury was received, was not so located as to be dangerous to appellant's employees 'in the discharge of their *ordinary* duties,' particular significance being given to the word 'ordinary.' If the employees, from the standpoint of the master, in the exercise of ordinary care were required in the course of their employment to go about or over the shaft, and so come in dangerous proximity thereto or contact therewith, whether the duty was ordinary or exceptional, the situation was within the statute. The law is cast in general terms. We can not interpolate into it the word 'ordinary,' and test appellant's conduct by a different standard than the legislature, in the proper execution of its police power, created. Such limitation upon the duty to guard as might be indicated by the word 'ordinary,' if it were in the statute modifying the word 'duty,' the legislature manifestly did not intend should



---

Caspar v. Lewin.

---

exist, from the fact that the word was industriously, by amendment, dropped from the law as it formerly existed; the words 'discharge of their duty' being substituted for 'engaged in their ordinary duties.'" (*Miller v. Kimberly & Clark Co.*, 137 Wis. 138, 142.)

This court has nothing to do with the policy of the factory act of this state, except to apprehend and give effect to it, or with the rigor of its requirements. Therefore it holds that it makes no difference whether the duty be ordinary and general or exceptional and occasional. If a person employed or laboring in a manufacturing establishment may, at the behest of duty, come in proximity to one of the appliances specified in the statute, it must be properly and safely guarded for the purpose of preventing or avoiding death or injury to him.

Common experience everywhere, registered in tables of gruesome statistics, affords fresh demonstration every day of the inadequacy of the common-law doctrine of reasonable care to provide places and instrumentalities reasonably safe against foreseeable occurrences to meet the situation of men, women and children who must manipulate, and must work in the midst of, the mechanical products of modern inventive genius. But when the legislature intervenes and makes the positive requirement that specific safeguards shall be maintained the statute is too often treated as a legal superfluity, and cases are decided according to the same old rules. So in this case the defendants want to try the question whether they should have reasonably anticipated that Caspar would be killed, notwithstanding the specific and positive command of the statute that a belt shifter or other safe mechanical contrivance for putting on the belt should be provided and that the shafting should be properly and safely guarded.

It is impossible for a factory owner or operator to foresee all the natural and probable results of his omissions. After an injury occurs he recognizes that his

failure to adopt some protective measure caused the injury. Therefore it is the law that if a reasonable man would have foreseen that injury in some form was likely to result, and injury does result, he is liable although the precise form of the injury was not foreseen. The factory act cuts squarely across the common-law doctrine of reasonable prudence and supplies that foresight in reference to the places, structures and appliances which it specifies. The legislature did not say, as in Connecticut and Massachusetts, that shafting so placed as, in the opinion of the factory inspector, to be dangerous to employees shall be guarded; or as in Wisconsin, that shafting so located as to be dangerous to employees shall be guarded. It said that all shafting used in a manufacturing establishment shall be guarded; and whenever a required safeguard or appliance has not been provided, the only question open to investigation is whether the injury occurred under circumstances which made the absence of it a contributing cause. In those instances in which practicability is a factor that matter may be tried, but to submit to a jury the question of prudence and foresight where the law has been ignored would be to reopen a subject which the legislature has closed by a final decision.

Section 1 of chapter 37 of the Laws of Washington, 1903, provides as follows:

"That any person, corporation or association, operating a factory, mill or workshop where machinery is used, shall provide and maintain in use proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys."

Interpreting this statute the supreme court of that state said:

"The legislature has left little room in the premises for the exercise of discretion of mill operators, or of judgment on the part of juries. The statute was manifestly intended for the protection of life and to prevent

---

Caspar v. Lewin.

---

the mangling of human bodies. To that end the legislature sought to make the protection as complete as such devices can make it. It did not say that belt shifters shall be maintained where necessary, and leave mill operators and juries to say when the necessity exists. The term 'proper belt shifters,' as used in the statutory connection, does not merely mean belt shifters in proper or necessary places, but rather *sufficient* 'belt shifters or other mechanical contrivances' to effect the 'throwing on or off belts on pulleys.' There is no classification of pulleys or places as to the matter of necessity or practicability; and it was the manifest theory of the lawmakers that, when belts have been placed upon any pulleys for the purpose of operating machinery, the necessity for removing and replacing them will at some time arise, and that, in order to guard against danger from an attempt to shift them while in operation, some effective contrivance must be maintained for that purpose.

"It certainly must be conceded that the contrivances must be maintained at all places where belts are shifted while in operation, in order to exempt the mill owner from the charge of negligence. The shifting of some belts while the machinery moves may seldom occur, but it is upon those rare occasions that the protection is needed. We are not now prepared to say that occasion may *never* arise when a question of this character may be proper for a jury, although it seems to us that, under this statute, such occasions must be very rare. To open the way for controversies as to whether the protection designated by the statute is or is not necessary or practicable in given places would lead to much litigation which might result in the nullification of the very purpose of the statute. Such statutes are mandatory, and it is not for the mill owners or juries to say whether the requirements are wise or necessary." (*Whelan v. Washington Lumber Co.*, 41 Wash. 153, 155.)

The protection of the act extends only to the persons employed or laboring in the factory—that is, acting within the scope of some employment or labor. The servant must be in a place which he may properly occupy, his conduct must be within the proper sphere of his duties, and the failure to supply a safeguard,

---

Caspar v. Lewin.

---

considered with reference to its purpose, must bear a true causal relation to the injury, although under the stringent provisions of the act it need not be the whole cause. The master may not, however, successfully evade the statute by attempting to narrow the scope of his servants' duty by rules or instructions. Thus, in this case, workmen were obliged to ascend the ladder to put the belt on the shaft pulley and to oil the shafting. The statute could not be nullified by an order to do this work only while the machinery was not in motion.

The court submitted to the jury the question of Caspar's contributory negligence, and the verdict acquitted him of fault. The defendants say that under the evidence he was culpably negligent as a matter of law. The plaintiff replies that contributory negligence is not a defense to an action founded upon the factory act. The question thus raised is one of interpretation. The statute is the very essence of simplicity, clear and emphatic in statement and absolutely free from ambiguity. "If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury" (Laws 1903, ch. 356, § 5; Gen. Stat. 1909, § 4680) an action lies.

It is the law in this state that when the language of a statute is plain and unambiguous there is no room left for a judicial interpretation which will change the effect of the language employed. (*Ayers v. Comm'rs of Trego Co.*, 37 Kan. 240.) This principle has been applied in some striking instances. Thus, in *Railway Co. v. Grain Co.*, 68 Kan. 585, the court refused to read into the statute of limitations an exception to meet the fraudulent concealment of a breach of contract, and in *McAllister v. Fair*, 72 Kan. 533, it refused to read into the statute of descents and distributions an exception which would disinherit a husband who feloniously

killed his intestate wife to acquire her property. The ground of these decisions is that the legislature makes the law and not the courts; that when language used in a statute is not in itself doubtful, and when given its ordinary significance does not admit of more than one meaning, that meaning governs; that it is not the province of the court to settle the domestic policies of the state; that it must administer the law regardless of individual cases of hardship; and that to engraft an exception upon a statute where the legislature has made none is judicial legislation. These principles are sound and apply with full vigor to the present statute.

The common law already gave a right of action to some employees under some circumstances. If the master failed to exercise reasonable care to provide reasonable safeguards and if the servant did not assume the risk and if he was not guilty of contributory negligence, then a liability existed. The sole purpose of the statute was to wipe out this narrow and conditional liability and substitute another. Words were duly chosen to that end which are insusceptible of misunderstanding. The word "any" is a term of indifference, and its repetition shows that it was used deliberately and emphatically—"any person," "any manufacturing establishment," "any case," "any safeguards or precautions." Consequently distinctions can not be made by interpolating qualifications and conditions, whether in respect to persons and cases or in respect to places and safeguards; and to declare that the act means no more than that "any person who at the time of injury, was himself in the exercise of due care" may maintain an action is to amend the law and not to interpret it. Furthermore, technical legal terms from the law of personal injuries are employed. The subject of contributing causes of the injury sued for is specifically treated. No exception to liability is made when the workman's negligence contributes to the injury. The legislature having chosen not to impose such

a condition upon recovery, the judiciary is powerless to do so.

The statute is a factory act and an employer's liability act combined. It bears internal evidence that the employer's liability acts of other states had been studied. They are usually drawn in favor of "an employee," and consequently are held to exclude employees of subcontractors. To meet this defect the protection of the act was extended not only to persons employed, but also to persons laboring, in a manufacturing establishment. The staple employer's liability act, however, expressly limits its application to "an employee, who at the time of the injury is in the exercise of due care." (Laws Colo. 1893, ch. 77; Acts Ind. 1893, ch. 130; Acts Mass. 1887, ch. 270; Laws N. Y. 1902, ch. 600.) The omission of any such restriction from the Kansas law appears to have been deliberate and intentional.

It may be said that the letter of a statute should not prevail over its sense and spirit, that a literal interpretation rewards carelessness, and that the act ought to be construed in connection with the settled maxims and principles of the common law. Precisely the same arguments were made in *McAllister v. Fair*, 72 Kan. 533, and were refuted in the opinion by the chief justice. But what is the spirit of this statute? It is to stop the insufferable waste of human life and limb which has been the universal accompaniment of the conduct of manufacturing industries. The law is a police regulation, adopted to reform the inhumanity of factory methods and to prevent the casting into the world of dependent cripples and widows and orphans left without means of support. This purpose includes the reduction of the number of casualties to the careless as well as to the prudent. If the prescribed precautions be taken and the required safeguards be installed, killing and maiming will cease, or at least will be reduced to a minimum.

In order that the factory owner may understand the

imperative character of the act it was necessary to provide some means of enforcing it. A criminal prosecution is a common method, but the legislature did not adopt it. Instead of this it provided a civil remedy in damages. The sanction was affixed for public purposes. In those cases in which want of care on the part of the employee contributes in some degree to his injury the public ends to be subserved would be defeated unless the negligent man were able to recover. Consequently the statute provides that an action may be maintained by any employee in any case in which the factory owner's neglect to obey the statute contributes to the injury.

In an action to recover the value of a cow killed by a railway company which had not fenced its track as the statute required Mr. Justice Cooley said:

"There still remains the question, however, whether the railway company could be held liable if the plaintiff himself was guilty of contributory negligence. Were this a common-law action it is clear that such contributory negligence would be a defense. [Citing cases.] But this is not a common-law action. It is an action given expressly by a statute, the purpose of which is not merely to compensate the owner of property destroyed for his loss, but to enforce against the railway company an obligation they owe to the public. The statute is a police regulation, adopted as much for the security of passengers as for the protection of property. [Citing cases.] And the decisions may almost be said to be uniform that in cases like the present, arising under such statutes, the mere negligence of the plaintiff in the care of his property can constitute no defense. [Citing cases.]" (*Flint & Pere Marquette R. R. Company v. Lull*, 28 Mich. 510, 515.)

Contributory negligence is not a defense to an action brought under the Kansas statute authorizing a recovery for stock killed in the operation of a railroad, where the right of way is not fenced. (*Railway Co. v. Paxton*, 75 Kan. 197.) The public policy to be promoted by fencing dangerous factory machinery is identical in

every respect with that which requires the fencing of railroad tracks.

It is fair to presume that the natural instincts of persons to avoid mutilation, pain and perhaps death will prevent any undue stimulation of carelessness through the influence of the statute, and the suggestion of such a result may be ignored along with the scarecrow arguments frequently advanced that litigation will be increased and capital driven from the state by effective factory acts. In any event these were matters for the legislature to weigh against the enormities of the former system, when adopting its policy.

The common law affords little aid to the interpretation of this statute, because, as already shown, it was intended to abrogate the common law and substitute a new and different duty, right and remedy.

"It is entirely clear, however, that where an absolute and specific duty to guard or fence dangerous machinery is imposed upon the master by statute, such new condition must, in a very material manner, affect the relations of the parties, and modify, to a considerable extent, their rights and duties as they existed at common law. And here a distinction is to be noted between statutes such as the employer's liability act (Acts 1893, p. 294, §§ 7083-7087, Burns, 1901), which provide in general terms that the employer shall be liable for injuries to an employee where the injury is occasioned by reason of defects in the condition of ways, works, plant, tools and machinery, etc., and statutes which require of the employer the performance of a specific duty, such as to guard or fence dangerous machinery. Statutes of the former class do little more than declare the rule of the common law. Statutes of the latter class impose specific obligations. A failure to comply with the requirements of the first may or may not be negligence. A violation of the second is an unlawful act or omission, a plain breach of a particular duty owing to the servant, and generally constitutes negligence *per se*." (*Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, 151.)

The common-law doctrines of reasonable care, assumption of risk, contributory negligence and coservice



---

Caspar v. Lewin.

---

took their rise at a time when shoes were made at the bench, the weaver had an apprentice or two, and the blacksmith a helper. Steam and electricity have revolutionized manufacturing industries so marvelously that no vestige of former conditions remains. But while the factory worker's environment has been completely changed his common-law rights and remedies have remained unchanged. It has been well understood for a long time that there is no juristic or economic excuse for this state of affairs. The liberty of capital to conduct its own business in its own way does not include the right to inflict the cruelties which have invariably characterized industrial progress. The liberty of the wage earner to contract for extra pay for extra hazard and to seek some other employment if he does not like his master's methods is a myth, or, as has been said, "a heartless mockery." (*Kilpatrick v. Grand Trunk Railway Co.*, 74 Ver. 288, 301.) The man and the machine at which he works should be recognized as substantially one piece of mechanism, and mishaps to either ought to be repaired and charged to the cost of maintenance. The courts can not abolish the old rules and adopt others which shall suit existing facts and remedy existing evils. That must be done by the legislature. But when tardy statutes are promulgated the courts should interpret them as favorably as their terms will allow, and not proceed to shackle them with the discredited common-law manacles. Sometimes it is held that quite radical factory acts make no change in the law. Sometimes it is declared that their most remedial features must be strictly construed because they penalize the factory owner. More often than otherwise it is held that the precious doctrine of assumption of risk can not be affected unless, like the king, it be expressly named. It is usually taken for granted that a legislature could not think of permitting a negligent factory worker to recover, although the farmer may collect damages from a railroad company for killing the cow or mule which he

negligently permits to run at large. In a recent Indiana case the opinion reads:

"It is a matter of common knowledge that, owing to the spirit of invention and the demands of business, the use of powerful, swiftly moving and dangerous machinery in manufacturing establishments in this country has been constantly growing at an ever-increasing rate for many years, and at the same time the casualty list from accidents resulting from the use of such machinery has been constantly swelling until at the date of the passage of this law it has reached alarming proportions. Both the title of the act, which declares it to be 'An act concerning labor, and providing means for protecting the liberty, safety and health of laborers,' etc., and the provisions of the law, clearly show that this condition of affairs was in the legislative mind in the enactment of this law, and was an evil sought to be remedied thereby. Its obvious purpose, among other things, was to reduce the hazard to those employed about dangerous machinery, to protect them from injury by accidental contact therewith, and it was evidently designed to protect the employee, not only from unavoidable accidents, but from his own negligent and careless acts which might result in his injury from accidental contact with such dangerous machinery. Not that the law gives to the employee a new right or remedy against his employer for such injuries, or in anywise relieves him from his common-law duty to exercise reasonable care to protect himself. Its purpose is to prevent injury, not to give a right or remedy for its occurrence." (*Evansville Hoop, etc., Co. v. Bailey*, 43 Ind. App. 153, 159.)

The Indiana statute makes a violation of its requirements a misdemeanor, punishable by fine for the first offense and by larger fines and by imprisonment for succeeding offenses. (Acts Ind. 1899, ch. 142, § 25.) The Kansas statute depends for its enforcement upon the terror of suits for damages. It may be wise or unwise, but it is so framed. As the Indiana court perceived, the public humanitarian purpose is the same although the employee be negligent. Therefore it may be

---

Caspar v. Lewin.

---

concluded that the Kansas statute did intend to confer a new right and a new remedy.

It is not necessary to pursue the subject further. The court holds that mere contributory negligence is not a defense to an action founded upon the factory act.

The foregoing conclusion is opposed to a statement made in *Madison v. Clippinger*, 74 Kan. 700, and repeated without examination or comment in some later cases. The question was not argued at all in the Madison case. Counsel conceded that contributory negligence was a defense, and the court was not called upon to examine the statute for the purpose of ascertaining the intention of the legislature in that regard. The opinion, however, cites *K. C. Ft. S. & G. Rld. Co. v. McHenry*, 24 Kan. 501, construing section 1 of chapter 93 of the Laws of 1870 (Gen. Stat. 1909, § 6998), which provides that railroads shall be liable for all damages done to persons or property in consequence of neglect on the part of the railroads. It was held that the act would be unconstitutional, as discriminating against railroads, if they were liable in every case of negligence, however slight, even though the plaintiff's negligence contributed equally, or more, to the injury. The statute considered, however, was not one providing for damages as a means of enforcing a positive duty enjoined by law in the interest of the public welfare. Statutes of the latter kind violate no principle of either the state or the federal constitution.

"The validity of this statute is challenged in an elaborate argument by defendant's counsel, because it excludes contributory negligence as a defense to an action brought for damages occasioned to a person or animal by want of a fence. It is doubtless true that the provision imposes an absolute liability in such a case. It certainly excludes the defense of contributory negligence where the corporation fails to perform the duty which the statute prescribes in the first instance. This is in the nature of a penalty for the neglect of the corporation to conform to a regulation which the legis-

---

Caspar v. Lewin.

---

lature seems to consider essential for the protection of life and property. We think there can be no doubt but such laws fall within the police power." (*Quackenbush, Adm'x, etc., v. Wisconsin & Minnesota R. R. Co.*, 62 Wis. 411, 415.)

In *K. P. Rly. Co. v. Peavey*, 34 Kan. 472, 480, it was held, upon the admission of counsel, without independent examination or consideration by the court, that the act of 1874 (Laws 1874, ch. 93, § 1) making railroad companies liable to employees in certain cases did not disturb the rules of contributory negligence. That statute, however, was leveled solely at the fellow-servant rule, and bears slight resemblance in scope or purpose to the factory act. The first paragraph of the syllabus in *Madison v. Clippinger*, 74 Kan. 700, is overruled.

One other matter should be noticed, although the affirmance of the judgment of the district court does not depend upon it. Section 6 of the act makes it sufficient, in order to establish liability, for the plaintiff to prove in the first instance that death or injury resulted in consequence of failure to provide the required safeguards, or that failure to provide such safeguards directly contributed to such death or injury. The plaintiff showed that the shafting was unguarded and that as a direct result and consequence Caspar was killed. Under the statute the plaintiff was not required to go further and offer proof in the first instance that it was practicable to guard the shafting. The legislature was evidently moved by the fact that very often an injured employee is not competent to demonstrate the practicability of providing safeguards, and may not be able to command the expert evidence necessary to do so. The accident may have wrecked the machine, or the factory owner may remove it or deny him access to it. When the employee is killed, or witnesses are killed, the way to recovery is still further embarrassed. On the other hand, the factory owner always possesses the

ability to show that additions in the direction of safety would destroy the efficiency of the appliance causing the injury, or would otherwise be impracticable.

In *Henschell v. Railway Co.*, 78 Kan. 411, this section of the statute was not brought to the attention of the court and its purpose and effect were not considered. In that case the plaintiff proved that he was injured by a type of machine which required the manipulation of unguarded cogs. Therefore it was said that he was bound to extricate himself from the predicament in which his own evidence placed him, by showing how it was practicable to guard the cogs. Since the statute contemplates that ordinarily a plaintiff should not rest under such a burden the third paragraph of the syllabus of that case is overruled.

The judgment of the district court is affirmed.

MASON, J. (concurring specially) : I fully agree with the decision, and with the opinion, except as to the matter covered by paragraph 9 of the syllabus. The meaning there given to section 6 of the factory act makes a stronger and doubtless a better law, but I have difficulty in finding it in the language of the statute. Each of the first four sections prescribes some type of safety device. Section 6 says that the plaintiff need only prove in the first instance an injury resulting from a failure of the defendant to provide his establishment "with safeguards as required by this act." The term "safeguards" seems to refer to all the safety devices required by the act—not merely to those covered by section 4. The force of the provision, as applied to sections 1, 2 and 3, must be that while no recovery can be had unless certain facts exist—for instance, that the injury was received by an employee in the course of his duty—such facts are a matter of defense, and in the first instance the plaintiff need only show a violation of the act and a consequent injury. I think it means the same as applied to section 4, and that the plaintiff has the burden

---

Caspar v. Lewin.

---

of proving a violation of the law. The law requires a saw, for instance, to be guarded, in any case where that is practicable. Unless it is practicable there is no requirement. The safeguard required by the act is a guard where it is practicable. Until it is shown that a guard was practicable no violation is shown. Of course the plaintiff need not call expert machinists to testify on the subject. But it seems in harmony with the language of the act that he should give such a description of the machinery and its operation that the jury may be able to form an opinion on the question.

Section 3 requires at least one fire escape in manufacturing establishments three or more stories high. A plaintiff suing under that provision would have to show not only that there was no fire escape, but that the building had three stories. It further provides that as many more fire escapes shall be constructed as may be reasonably necessary. If one fire escape was provided and the plaintiff complained of the lack of another, I think he should have the burden of showing that another was reasonably necessary. So if he were injured by reason of a fast pulley, I think he should show that it was used in such a way that it would have been practicable to have substituted a loose pulley.

PORTER, J. (concurring specially): I concur in the result and in holding that contributory negligence is not a defense in an action of this character. The only reasonable construction that can be given to the language of the act in my opinion is to hold that it enjoins a positive duty upon the employer, to which neither contributory negligence nor assumption of risk is a defense. I dissent, however, from that portion of the opinion and the corresponding portion of the syllabus which overrules the case of *Henschell v. Railway Co.*, 78 Kan. 411. I think that the words "with safeguards as required by this act" in section 6 have reference to all the safety devices required by the act, and not

---

Bank v. Northup.

---

merely to those mentioned in that section. No hardship or serious burden is imposed upon a plaintiff by requiring him to offer some evidence tending to show that his injury was caused by a failure of the defendant to comply with the provisions of the act.

---

THE FIRST NATIONAL BANK OF CHANUTE, *Appellee*,  
v. G. L. NORTHUP *et al.*, *Appellants*.

No. 16,558.

SYLLABUS BY THE COURT.

1. **CORPORATIONS—*Liability of Stockholders—Shares Nominally Paid Up—Notice to Creditors.*** Where at the time of the organization of a corporation stock is issued at a discount, less than par being received for shares that are nominally paid up, the company agreeing that no further payment shall be demanded, the ordinary rule is that the stockholder assumes a liability, so far as is necessary for the protection of creditors who have become such without notice of such arrangement, up to the point where his total contribution to the corporate funds equals the face value of his stock.
2. ——— ***Liability of Holders of Shares Issued for Property Worth Less than Face Value of Stock.*** Where stock purporting to be fully paid up is issued in exchange for property that the parties to the transaction agree is worth a fixed amount, which is less than the face of the stock, creditors of the corporation have a right to look to the stockholder to the same extent as though he had obtained his stock by the payment in cash of the amount so agreed upon.
3. ——— ***Same.*** Where the stockholders of a corporation agree that a new corporation shall be formed, to which shall be transferred a part of its property, in return for a division of the capital stock of the new company among the members of the old one, in proportion to their interest therein, and further agree that the property is worth a stated amount and that anyone not caring to receive stock shall be paid in cash on that basis, and this arrangement is carried out, the holders of stock so acquired are liable to corporate creditors to the

---

Bank v. Northup.

---

same extent as though they had paid cash therefor on the basis of such valuation.

4. ——— *Notice to Corporation—Knowledge of Officer Having a Personal Interest.* Where a bank has lent money to a corporation the stock of which is nominally but not actually paid in full, its right to look to the stockholders for repayment to the extent to which they have not paid the face value of their stock is not defeated by the fact that the president of the corporation, having a substantial pecuniary interest therein, was also the cashier of the bank, and acted for both parties in the negotiation of the loan, without communicating to any other officer of the bank his knowledge that the stock had been issued at a discount.

Appeal from Neosho district court; OSCAR FOUST, judge *pro tem.* Opinion filed June 11, 1910. Affirmed.

*H. P. Farrelly, and T. R. Evans, for the appellants.*  
*James W. Reid, and John J. Jones, for the appellee.*

The opinion of the court was delivered by

MASON, J.: The First National Bank of Chanute obtained a judgment against the West Plant Oil Company, a corporation organized under the laws of Arizona. Not being able to realize upon the judgment otherwise, it sued a number of stockholders, basing its claim against them upon the ground that they had not paid to the corporation the face value of their shares. It obtained judgment against the defendants and they appeal.

The facts material to the questions presented, as found by the court, were these: The Kansas Vitrified Brick Company, a corporation capitalized at \$50,000, had among its assets a number of oil-and-gas leases. Its members concluded that this property could be handled to better advantage by a separate company. They therefore organized the Arizona corporation for this purpose, taking out a charter fixing the capital stock at \$1,000,000. The brick company transferred



to the oil company the property referred to, by an instrument reciting a consideration of \$25,000, and the oil company in payment therefor issued all its stock to the shareholders in the brick company, in proportion to their respective holdings therein. The certificates for the stock thus issued recited that it was fully paid and nonassessable. The stockholders of the brick company agreed among themselves that the property so transferred was worth \$25,000, and that any who did not care to accept stock in the new company should receive cash in lieu thereof on that basis. The oil company never received any other payments from its stockholders. Its actual invested capital was the property for which its stock was issued. It borrowed \$10,000 from a bank which was afterward merged in the plaintiff bank, a new note being taken for the amount, which was the basis of the judgment sought to be collected in this action. The president of the oil company, being the owner of a substantial amount of its stock, was the cashier of the bank that lent the money and the president of the plaintiff bank when the renewal note was taken. In each capacity he engaged daily in the conduct of the banking business. He acted for each bank in these transactions, as well as for the oil company. He knew that the corporation's stock had not been paid for at its face value, but no other officer of either bank had knowledge of that fact.

The defendants claim that since their stock was issued as fully paid they owed the oil company nothing, and hence were not liable to its creditors for the payment of its debts; that if any such liability existed it could only be with respect to credit extended on the faith of the capitalization stated in the charter, and that the plaintiff's loan was not of that character, since the bank's officer, who was active in making it, knew all about the facts in the case.

Where at the time of the organization of a corporation stock is issued at a discount, less than par being

received for shares that are nominally paid up, the company agreeing that no further payment shall be demanded, the general rule is that so far as is necessary for the protection of creditors the stockholder assumes a further liability up to the point where his total contribution to the corporate fund equals the face value of his stock. (10 Cyc. 460, 461; 4 Thomp. Corp., 2d ed., §§ 3902, 3911; 1 Cook, Corp., 6th ed., §§ 42, 45; 8 L. R. A., n. s., 263, note.) Where the stock is issued for property, the authorities differ; some follow what has been called the "true value" rule—that is, that the creditors' rights are the same as though the corporation had received, instead of the property, its actual value in money; others adopt the "good faith" rule—that is, that in the absence of fraud the stockholder can not be held liable for any further payment, however greatly the property may have been overvalued. (10 Cyc. 473; 4 Thomp. Corp., 2d ed., §§ 3975, 3976.) The overvaluation, if gross, has been held to be evidence of fraud; if intentional, to be proof of it. (4 Thomp. Corp., 2d ed., §§ 3978, 3979. See, also, 42 L. R. A. 593, note; 23 C. C. A. 315, 326, 332-334, note; 1 Cook, Corp., 6th ed., § 46, and note 2, p. 165.) In the work last cited the modern tendency is represented as being against holding the stockholder liable, the author saying:

"During the past thirty years there has been a vast amount of litigation on this subject. The courts still disagree in their conclusions, but a careful study of the cases will show that upon authority as well as principle the stockholders can not be held liable in such a case.

. . . This principle of law, that there is no liability on stock issued for property the value of which is less than the par value of the stock, seems a self-evident principle of law. Moreover, this principle is based on business usage and is sound practice. There is no more harm in the issue of stock below par than there is in the issue of a note or bond below par. The extent to which the courts have gone in sustaining such issues of stock for property is shown by the fact that even con-

stitutional and statutory prohibitions against watered stock have been practically construed away by the courts. Moreover, the laws of trade are more powerful than the laws of men, and in business circles it has become customary to capitalize property at a reasonably high figure. This is due to the fact that it is easier to sell stock at less than par than at par, and also to the fact that, by a large capitalization, dividends are kept low enough to avoid the cupidity of possible competitors and the interference of legislatures. To such an extent is this practice carried of issuing stock for property at an overvaluation that the investing public and persons who give credit to corporations rather expect it, and they no longer rely upon the nominal capitalization of the company. Experience has taught them that they must investigate the real financial condition of the company, and invest or give credit upon that alone." (1 Cook, Corp., 6th ed., § 46.)

In the present case, if we were required to apply the "good faith" rule, there would seem to be little difficulty in saying that the exchange of the property for a stock issue of \$1,000,000 involved an overvaluation that was both gross and intentional. But the case is hardly one of overvaluation. The amount recited as the consideration for the transfer (\$25,000) appears to have been the valuation fixed by the persons concerned. This is shown by the fact that the stockholders of the old company who preferred not to become members of the new one were to be paid out on that basis. The real transaction amounted to an agreement to issue stock at  $2\frac{1}{2}$  cents on the dollar, and the acceptance of the property in lieu of cash on those terms, at a valuation of \$25,000. The contention of the defendants that their stock was in fact fully paid for must therefore fail.

Inasmuch as the holder of stock which is issued as fully paid owes nothing to the corporation (19 L. R. A., n. s., 115, note) any liability to creditors must be founded upon the theory that they have extended credit upon the faith of the nominal capitalization.

---

Bank v. Northup.

---

Consequently it is held that a creditor who at the time he becomes such knows the facts regarding the issuance of the stock, not being within the reason of the rule of liability, is not within its protection. (1 Cook, Corp., 6th ed., § 46, p. 188; 4 Thomp. Corp., 2d ed., § 3983; 8 L. R. A., n. s., 271, note; 10 Ann. Cas. 90, note; 23 C. C. A. 340, note.)

The defendants claim that since the cashier while acting for the bank in making the loan knew that the stock in the oil company had been issued at a discount, the bank itself must be deemed to have had that knowledge. A corporation in dealing with one of its own officers, who acts for himself and not for it, is not chargeable with notice of facts known to him. (2 Thomp. Corp., 2d ed., § 1655; 10 Cyc. 1063; 36 Am. Dec. 191, note.) The authorities are in substantial agreement upon this proposition, and upon the reasons for it, which are thus stated in *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481:

"It is undoubtedly true, as a general proposition, that the principal is charged with the knowledge and bound by the acts of the agent; but this general rule, like most other rules, has its exceptions and limitations. The general rule is based upon the principle that, as it is the duty of the agent to act upon the notice for his principal, or to communicate the information to his principal in the proper discharge of his trust as such agent, notice to the agent is likewise legal notice to his principal. This rule applies to the agents and officers of corporations, as well as others. This general rule has no application, however, to a case in which the one party does not act as agent, but avowedly for himself, and adversely to the interests of the other. In other words, neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself and deals with the corporation as if he had no official relations with it." (Page 486.)

It can make no difference in principle whether the officer of a corporation in dealing with it acts solely

---

Bank v. Northup.

---

for himself or as the agent for another company in which he holds stock. In either case his own interests are to some extent opposed to those of the corporation, which he is under a greater or less temptation to sacrifice. The rule of law can not be made to depend upon the extent of the officer's personal interest, so that it is substantial. In the present case, if the cashier had asked the directors to make the loan and they had done so on their own judgment, his interest in the oil company was sufficient so that the presumption would be that he did not tell them the stock had been issued at a discount, and his knowledge of the fact would not be imputed to the bank. But the cashier acted for the bank in this very transaction, either alone or in connection with other officers, so that in a sense the bank—that is, its active agent in the transaction—had actual knowledge of the situation, and this phase of the matter involves a different question. In the note last cited it is said:

“It will be noticed that in all these cases the corporate agent was not acting in his official character in the particular transaction. The fact of his agency was merely incidental. It is obvious that the same rule can not be applied where the agent acts officially upon a matter in which he has a personal interest, even though such interest is adverse to that of the corporation. In such cases it is his duty, notwithstanding his interest, to communicate to his company any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication. This, it seems to us, is the principle to which are to be referred those cases, hereafter to be mentioned, in which corporations have been held to be affected with notice of facts known to some of their directors acting officially upon matters in which they had a personal interest.” (36 Am. Dec. 193.)

(See, also, *Bank of New Milford v. Town of New Milford*, 36 Conn. 93; *Brobston v. Penniman*, 97 Ga. 527; *Morris v. Georgia Loan Co.*, 109 Ga. 12; *Holden v. New York and Erie Bank et al.*, 72 N. Y. 286.)

---

Bank v. Northup.

---

The note, however, continues:

"Where the agent or officer of a corporation is also agent of another corporation or person, and there are mutual dealings between the principals through the intervention of such agent, the question as to whether either principal is to be affected with notice of what is known to the officer or agent by virtue of his relation to the other principal will depend upon circumstances. If the knowledge is such as the principal himself, if present, would not be bound to communicate, there would seem to be no reason why the agent should be presumed to have communicated it. Thus, if one of two corporations having a common officer borrows money of the other, through the intervention of such officer, for a purpose which is illegal, or enters into a contract which is *ultra vires*, the other corporation ought not to be charged with notice of the facts: *In re Marseilles etc. Co.*, L. R., 7 Ch. App. 161; *In re Contract Corporation*, L. R., 8 Eq. 14. The two corporations are dealing in such a case as strangers, and the fact that they have a common officer or other agent ought to make no difference in the transaction. There is in reality in such a case a conflict of duty on the part of the agent. He has knowledge of certain facts which it is his duty to one principal to conceal, and to the other to communicate. There can, therefore, be no presumption either way, and the question of notice depends upon whether he did in fact communicate the information." (36 Am. Dec. 193.)

In *Whittle v. Vanderbilt Mining & Milling Co.*, 83 Fed. 48, it was said:

"The reason . . . why the knowledge of a corporate director, relating to a transaction with the corporation, in which he is personally concerned, and acts for himself, will not be imputed to the corporation, is that his adversary interests are such that he will not be likely to communicate to the corporation a fact which he is thus interested in concealing. This reason applies as strongly when the interested director acts for the corporation as when he does not so act, and therefore the cases are indistinguishable." (Page 54.)

And in *Bank of Overton v. Thompson*, 56 C. C. A. 554:

"It is fairly well settled that knowledge of an agent, actually concealed from his principal, while the agent is dealing with the principal on his own account, is not to be imputed to the principal, even though the agent, assuming to act as such, did whatever was done on the part of the principal in the transaction with himself, if disclosure of the matter concealed would have had a tendency to defeat his purposes. His position would be as antagonistic to his principal, and his motive for concealment as great as, and easier of accomplishment than, if he were dealing with the principal directly, or with another agent." (Page 557.)

Other cases bearing more or less directly upon this point are included in a note to that last cited. (See, also, *La. State Bank v. Senecal*, 13 La. 525, and *Commercial Bank v. Cunningham*, 41 Mass. 270.)

Even if in this case the other officers of the bank took no part in lending the money, it does not follow that their ignorance of the corporation's affairs had no effect upon the transaction. If they had known its condition they might have interfered and prevented the loan. The interest of the cashier as a stockholder of the oil company, desiring the loan to be made, lay in not disclosing to them any fact tending to impair its credit. The findings affirmatively show that none of them was in fact informed of the stock having been issued at a discount. The failure of the cashier to consult with the officers who should have passed upon the matter would create a situation much the same as though he had submitted it to their decision and withheld this information from them. We think his knowledge can not be considered as that of the bank.

In volume 4 of his Commentaries on the Law of Corporations (§ 5212) Seymour D. Thompson used this language, the last sentence of which is omitted from the corresponding section (2 Thomp. Corp., 2d ed.,

§ 1658) of the revision of the work published as a second edition :

“Where two corporations have dealings with each other through the intervention of a mutual agent, the question whether or not one of the corporations is to be charged with notice of what is known to the agent by virtue of his relation to the other corporation must depend largely upon the circumstances of the particular case. . . . It must be obvious that, where the mutual agent is thus situated, it will become a *question of fact* whether he is interested in cheating one corporation at the expense of the other; and if it is found that he is so interested, it would be a very unjust principle that would impute to the corporation which he is endeavoring to cheat his knowledge of facts which he is interested in concealing from it.”

In this quotation fraud is doubtless spoken of in order to present in its most extreme form the injustice of imputing to a corporation the knowledge which its active agent possesses, but which he is interested in concealing. The existence of a fraudulent purpose is not necessary to make the principle applicable. In the present case there is no suggestion of any bad faith, but the rights of the parties are to be measured by a general rule, one test of the soundness of which is the barrier it opposes to unfairness in particular cases. In a transaction in which the officer does not act for the corporation he is presumed not to have communicated any knowledge which he has an interest in concealing. So, where he does represent the company, he ought not to be regarded as using in its behalf information which he possesses, but which he has a personal motive in ignoring. Suppose the cashier of a bank, acting either alone or in conjunction with other officers whom he does not advise of the facts, makes a loan to himself, taking as security a mortgage upon land which is apparently unencumbered, but which he knows is subject to an unrecorded mortgage: the bank, through an agent by whom it acted in the matter, has in a sense



---

Bank v. Northup.

---

actual notice of the existence of the prior lien, but to deny it the benefit of the record title would be to apply a harsh and inequitable rule. The present situation differs only in degree from that supposed. Here the cashier had a personal interest in the money being lent to the oil company; he knew that instead of having a capital of \$1,000,000, as the charter stated, the corporation had but \$25,000; his own ends were best served by not imparting his knowledge to others, and by not permitting his own conduct to be influenced by it. He must be presumed not to have communicated it, and not to have acted upon it. Under such circumstances the bank could have derived no benefit from it, and should not be deemed to have possessed it. Of course, in a situation where the application of the rule here followed would work a fraud or injustice upon an innocent and diligent third party, a very different question would be presented, and it may be that each case should be controlled by a balancing of equities. Here the stockholders who are held liable can not be regarded as free from fault. By launching the corporation with a nominal capital of \$1,000,000 they gave it a fictitious basis of credit, and incurred the risk of personal liability to that amount, which they could expect to avoid only in special instances, as a matter of exceptional good fortune. That the facts are held not to bring them within the exception does not argue the result unjust.

Several cases in addition to those already cited tend to support the position of the defendants. A headnote to *Berry v. Rood*, 168 Mo. 316, as reported in 67 S. W. 644, reads:

"Where a certain corporation borrowing and a corporation lending money are represented in making the loan by one who is the president of both corporations, his knowledge that the capital stock of the borrowing corporation has been paid up in property at an inflated value is notice to the lending corporation, which will prevent it from being entitled to require a stockholder

## Shale v. Bank.

to make his subscription good by paying up to the par value of the stock."

The substance of this language is quoted in volume 2 of the second edition of Thompson on Corporations, section 1660. A sentence in the opinion supports the view so stated, but the decision was not based upon it and the question involved was not discussed further. Such a rule was applied in *Lea, et al. v. Iron Belt Mercantile Co.*, 147 Ala. 421, but mainly upon the ground that the officer of the corporation making the loan owned nearly all of its stock, and the transaction from its standpoint was in fact for his own benefit.

The judgment is affirmed.

---

W. F. SHALE, *as Trustee, etc., Appellee*, v. THE FARMERS BANK OF MORRILL, *Appellant*.

No. 16,559.

## SYLLABUS BY THE COURT.

**BANKRUPTCY—*Preferential Payment—Proof.*** In an action by the trustee of a bankrupt to recover a payment as a preference, where it appeared by the undisputed facts that the creditor had reasonable cause to believe that the debtor was insolvent and intended a preference, *held* not error to direct a verdict in favor of the plaintiff.

Appeal from Brown district court; WILLIAM I. STUART, judge. Opinion filed June 11, 1910. Affirmed.

*James Falloon*, for the appellant.

*F. M. Pearl*, and *Means & Archer*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The trustee of a bankrupt sued to recover a sum of money paid to the defendant by the bankrupt, which the plaintiff claimed constituted a preference under the bankrupt law. At the close of the

82 649  
182 603

testimony the court directed a verdict for the plaintiff, which is the error complained of.

There was no real dispute as to the facts. Roy Summerfelt was indebted to the bank on two promissory notes, aggregating \$700.56. Neither of the notes was due. To secure one of them the bank had held for several months a chattel mortgage on his stock of merchandise at Morrill, in Brown county. The mortgage was not recorded and the stock remained in the possession of Summerfelt. His business was not prosperous. About twenty-five wholesale houses and jobbers who were his creditors had within the past few months made sight drafts upon him through the defendant bank, all of which were returned by the bank unpaid. Four of these drafts were in the hands of the bank at the time the payment in controversy was made. On the 21st day of July, 1906, Summerfelt sold his stock to one Fletcher for the sum of \$1750. The cashier of the bank had a talk with Fletcher before the sale was completed, and got him to consent that the deal should be closed at the bank because the bank claimed a lien on the stock. The day the sale was made Fletcher and Summerfelt started to Hiawatha to examine the records. The cashier saw them and called Fletcher into the bank and insisted that the matter be settled there, and that the bank should be paid. The settlement was made in the bank by Fletcher giving Summerfelt his check for \$1750, which Summerfelt deposited to his credit, and he immediately gave his check to the bank for the amount of the two notes.

Although the cashier testified that he had no information that Summerfelt was in failing circumstances, and that he did not insist upon the payment of the notes for fear someone else would be paid and the bank would not be able to collect its notes, there was no denial of the facts, from which it appeared that the bank not only had reasonable cause to believe that it was obtain-

---

Shale v. Bank.

---

ing a preference but demanded and accepted the payment with that intention. The testimony of the cashier shows that he knew Summerfelt was being pressed by his creditors; that the stock was being sold at 80 or 85 cents on the dollar, and that Summerfelt was going out of business; that he had heard that Summerfelt was in trouble of such a character that it might involve the latter financially. The notes which the bank demanded payment of were neither of them due. The bank was familiar with the debtor's business and knew that he was dealing with a large number of wholesale houses whose drafts he habitually returned unpaid. It knew that at this time it held unpaid drafts in its hands for collection, and it did not demand the payment of these until after it had received payment of its own unmatured notes.

Conceding that a bank has the right to set-off a depositor's account against a matured indebtedness due the bank, it appears that in this case the payment was not made by the bank applying the depositor's account to the payment, but by a check which it had required the bankrupt to give in payment of notes not due. A payment under somewhat similar circumstances was held to constitute a preference in *Ridge Ave. Bank v. Studheim*, 145 Fed. 798. To the same effect is *Irish v. Citizens' Trust Co.*, 163 Fed. 880, where it was held that a bank can not charge a debtor's account or receive a check in payment of a note it holds, which is not yet due, without constituting a preference under the bankruptcy law.

The mere statement of the cashier that he did not believe that Summerfelt was in failing circumstances did not require that the case should be submitted to the jury, in view of the undisputed facts. Proof of actual knowledge or actual belief on the part of the officers of the bank was not required. To constitute a preference it is only necessary to show that the creditor had reasonable cause to believe that a preference was intended.

---

Capell v. Dill.

---

(Collier, Bankr., 7th ed., p. 666, par. 2.) Conceding, therefore, to all the evidence offered by the defendant the greatest probative force to which it is fairly entitled, it is apparent that it would have been an idle ceremony to submit the case to the jury merely because the officers of the bank denied knowledge of the failing condition of the bankrupt, when the undisputed facts and circumstances in the case showed such knowledge and reasonable cause for believing that a preference was intended.

The judgment is affirmed.

---

CHARLES CAPELL, *Appellee*, v. THOMAS E. DILL *et al.*,  
*Appellants*.

No. 16,561.

SYLLABUS BY THE COURT.

1. MORTGAGES—*Purchaser at Void Foreclosure Sale—Subrogation—Mortgagee in Possession*. A grantee in good faith, holding possession under a sheriff's deed in foreclosure proceedings which did not divest the title of the mortgagor, is properly subrogated to the rights of the mortgagee, and considered as a mortgagee in possession.
2. ——— *Limitation of Actions—Quieting Title—Ejectment*. In the circumstances stated above the heirs of the mortgagor will not be given a decree quieting their title against the party so held to be a mortgagee in possession, nor will they be awarded the possession until they first satisfy the mortgage debt, although an action thereon would be barred by the statute of limitations.

Appeal from Lane district court; CHARLES E. LOBDELL, judge. Opinion filed June 11, 1910. Affirmed.

*J. S. Simmons*, for the appellants.

*Wheeler & Switzer*, for the appellee.

The opinion of the court was delivered by

BENSON, J.: This action is to quiet title, both parties asking for that relief. Charles E. Dill was the patentee of the land. He mortgaged it on August 1, 1887, and died in August, 1889, leaving the mortgage debt unpaid and leaving the defendants, Thomas E. Dill and Nettie A. Horton, his sole heirs at law. On the 2d day of April, 1890, Frank O. Cunningham, assignee of the mortgage, commenced an action of foreclosure, naming Charles E. Dill as a defendant, and service was made by publication, purporting to be against him as if he were living. The petition in the foreclosure suit alleged the assignment of the mortgage to Cunningham, and subsequent conveyances of the land as follow: Charles E. Dill to R. I. Patterson, Patterson to John M. Newhouse, and Newhouse to Jeff D. Trivitt, who assumed the payment of the mortgage. These persons were made parties to the foreclosure suit, and a judgment was rendered against Trivitt for the amount due upon the mortgage, and against his codefendants for foreclosure and sale. The land was sold under that judgment to A. W. Rice, January 6, 1891. A grantee of Rice paid the taxes on the land to and including the taxes of 1905, and then conveyed it to the plaintiff, Charles Capell, who took and still holds actual possession. Before he took possession the land was vacant. There is no record of any conveyance from Charles E. Dill to R. I. Patterson, although alleged in the petition for foreclosure, and the court upon the trial of this action found that such a conveyance had not been made. The defendants have not paid the mortgage debt or any taxes on the land, nor offered to do so.

The court, having found these facts, concluded as a matter of law that the foreclosure proceedings were void as to the defendants, Thomas E. Dill and Nettie A. Horton, for the reason that Charles E. Dill, under whom they hold title by descent, had died before that

suit was brought, and that they still held the title. The court also found that the foreclosure proceedings were conducted in good faith, and held that the plaintiff, Capell, holding under such proceedings, is subrogated to the rights of the owner of the mortgage, and is therefore a mortgagee in possession. The judgment was that the prayer of the plaintiff for a decree quieting his title be refused, that the prayer of the defendants, Dill and Horton, for a decree quieting their title and for possession be likewise refused, and that the costs be divided. The defendants appeal.

The principal contention of the defendants is that the plaintiff is not entitled to the rights of a mortgagee in possession because the mortgage debt was barred by limitation before he took possession. It is clear, however, that it was not barred at the date of the sheriff's deed. The plaintiff took conveyance and possession under the sheriff's grantee upon the supposition that the proceedings had been taken against the proper parties, and that the foreclosure was regular. Being mistaken in this, the court held that he stood in the shoes of the owner of the mortgage in possession. In this situation the fact that the plaintiff could not enforce the mortgage against the defendants does not give them the right to an affirmative judgment quieting their title or for possession. They can not have such relief until they pay the debt, although its payment can not be enforced by action against them. A mortgagor can not quiet his title against the holder of the mortgage on the naked ground that the right of foreclosure is barred by limitation. (*Gibson v. Johnson*, 73 Kan. 261.) Neither can he recover possession in such circumstances. (*Walters v. Chance*, 73 Kan. 680.) In the case last cited it was said:

"Whether the holder of a mortgage who is in possession is entitled to make the defense of a 'mortgagee in possession,' after condition broken, depends upon the equities of each case. . . . If, after condition broken, the premises are unoccupied, the mortgagee

may, if he can do so peaceably, enter into the possession under his mortgage; and he can not be ejected therefrom by the owner until his mortgage lien has been fully satisfied." (Pages 685, 686.)

The taxes were regularly paid by a grantee of the sheriff under the foreclosure, holding by a sheriff's deed duly recorded—the lands being vacant. The plaintiff then took actual possession and improved the land. In this situation it would be inequitable to compel him to yield possession without payment of the mortgage debt. Seeking equity, the defendants should do equity. The statute of limitations, while a shield for defense, is not a weapon of attack, and can not be made the basis of affirmative relief. (*Burditt v. Burditt*, 62 Kan. 576; *Holden v. Spier*, 65 Kan. 412.)

The defendants successfully defended against the claim of the plaintiff to have his title quieted, but they failed upon their affirmative demand for relief against him, for the very good reason that they could not quiet their title against the unpaid mortgage. There was no error in the judgment denying affirmative relief, and it is affirmed.

---

THE COLEAN MANUFACTURING COMPANY, *Appellee*,  
v. CHARLES JOHNSON, *Appellant*.

No. 16,562.

SYLLABUS BY THE COURT.

1. **REPLEVIN**—*Capacity of Plaintiff to Sue—Exempt Property—Burden of Proof.* In an action of replevin, brought by a mortgagee to recover the possession of property under a chattel mortgage given to secure the payment of certain notes, where the mortgagor admits the execution of the notes and mortgage and defends only upon the grounds that the mortgagee has no right to maintain the action and the property is exempt, the court does not err in placing the burden of proof as to the contested issues upon the mortgagor.



---

Colean v. Johnson.

---

2. ——— *Possession Retained by Plaintiff, Who Prevails—Alternative Judgment for Value of Property.* When the mortgaged property is seized under the writ of replevin, and the possession of the same is retained by the plaintiff up to the time of judgment in his favor, there is no necessity for rendering an alternative judgment that the plaintiff shall recover the value of the property in case a return thereof can not be had.
3. ——— *General Denial—Defenses Provable—Capacity of Plaintiff to Sue.* Under a general denial in a replevin action the defendant may defeat a recovery by the plaintiff by showing that it is a foreign corporation without authority to carry on business in the state and is not entitled to maintain that or any other action in the courts of the state.

Appeal from Lane district court; CHARLES E. LOBDELL, judge. Opinion filed June 11, 1910. Modified.

*J. S. Simmons*, for the appellant.

*A. L. Ferris*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action of replevin to recover the possession of an engine and other machinery. The Colean Manufacturing Company sold an engine to Charles Johnson for \$2400, and took from him three notes, each for \$800, and also a mortgage on the engine and other machinery to secure the payment of the notes. Johnson failed to pay the notes when they became due and this action was brought to recover the possession of the mortgaged property. Not all of the mortgaged property was seized under the writ of replevin, but so much of it as was practical to move or in a condition to be moved was replevined. No redelivery bond was given. A trial was had, without a jury, which resulted in favor of the company.

The first complaint is that the trial court ruled that the burden of proof was upon appellant. There is nothing substantial in this complaint. At the opening of the trial appellant announced that he would not

contest the execution of the notes and mortgage, and that his defenses would be based upon the incapacity of appellee to maintain the action and that the property taken was exempt. In that state of the case it was unnecessary for appellee to prove the execution of the notes and mortgage or the amount due thereon. (*Mills v. Kansas Lumber Co.*, 26 Kan. 574.) Appellant had the affirmative of the defenses outlined, and the burden was properly placed on him as to these defenses.

It is contended that the engine did not come up to the warranty, that there was a partial failure of consideration, and that the court should have found the amount due upon the mortgage debt. The testimony tends to show that the appellant used the machine for a year and a half without raising the question that the engine was not as warranted, and also that he had expressed satisfaction with it after he had used it more than a year, and, further, that he did not conform to the requirements of the contract in respect to rescission. Under this testimony and the general finding of the court it may be assumed that the court held that there was no failure of consideration.

The failure to find the value of the property seized and to render judgment in the alternative was not error. The property was not redelivered to appellant, but remained in the possession of appellee after it was taken under the writ of replevin, and the court adjudged that the appellee was entitled to the possession of the mortgaged property. The appellant being in default in the payment of the debt and having failed to comply with the conditions of the mortgage, appellee was entitled to the possession of the mortgaged property. The right to its possession at the commencement of the action was the issue in the case. This having been determined in favor of the appellee, an alternative judgment was not required. If when the property is sold to satisfy the mortgage the proceeds

exceed the mortgage debt and costs of sale the surplus will be paid to the mortgagor or other party who may be entitled to it.

Testimony was offered and received to the effect that the plaintiff was a nonresident corporation and was not authorized to do business in the state nor to maintain the action. Afterward the court refused to consider the evidence upon this subject, or to decide the question, "for the reason that this issue was not properly raised under the pleadings herein, and *for this reason only.*" This ruling can not be sustained. Defendant was entitled to have the question considered and determined by the trial court. He had announced at the opening of the trial that plaintiff was not entitled to maintain the action. Plaintiff did not challenge his right to make this defense, and although not specially pleaded evidence to support it was received. Plaintiff's right to maintain the action was therefore treated as if it were an issue in the case up to the time of rendering judgment. Apart from this consideration, it is the Kansas rule and practice that in replevin cases every defense, general or special, meritorious or technical, may be made under a general denial. In ordinary actions the defense that a corporation has no authority to do business in the state or that plaintiff has no capacity to maintain the action can not be raised on a general denial, but to be availed of must be specially pleaded. (*Fraternal Union v. Crosier*, 70 Kan. 85; *Hatch v. Geiser*, 73 Kan. 81.) A different rule obtains in actions of replevin. In such cases a general denial puts in issue not only the plaintiff's right of possession but his right to maintain the action to recover possession. Under it he may show anything which may defeat the plaintiff's right to recover in that action. In *Street v. Morgan*, 64 Kan. 85, it was said:

"In replevin a general denial closes the issues and puts the plaintiff to proof of every fact material to the

maintenance of his action. Under it the defendant can prove every fact which goes to show that the plaintiff never had a cause of action against him. Since any defense to an action of replevin, either in bar or in abatement, may be proved under a general denial, a reply was wholly unnecessary." (Page 85.)

Other cases to the same effect are: *Wilson v. Fuller*, 9 Kan. 176; *Yandle v. Crane*, 13 Kan. 344; *Russell v. Smith*, 14 Kan. 366; *Holmberg v. Dean*, 21 Kan. 73; *White v. Gemeny*, 47 Kan. 741.

The authorities in other jurisdictions as to what constitutes a sufficient answer in replevin and what questions can be raised under a general denial are not uniform. In Missouri it is held that a matter of misjoinder, or the right of a plaintiff who is one of several joint owners to maintain an action in replevin, need not be specially pleaded in abatement, but may be taken advantage of under a general denial. (*Upham & Gordon v. Allen*, 76 Mo. App. 206.) It has been ruled in North Carolina that a defect of parties can be raised on the general issue. (*Cain v. Wright*, 50 N. C. 282. See, also, *Heaton v. Wilson*, 123 N. C. 398; *Iowa Savings Bank v. Frink*, 1 Neb. [unofficial] 14; *Downtain v. Ray*, 31 Tex. Civ. App. 298.)

Under his general denial, and the rule which obtains in this state, appellant was entitled to prove that appellee had no capacity to sue, no right to maintain this action of replevin brought against him, and hence the judgment must be modified. The decision of the court is affirmed as to all the points in contention except the single one which the court refused to consider. That part of the judgment is set aside and the cause remanded to try and determine whether appellee is a foreign corporation without authority to do business in Kansas or the capacity and right to maintain this action against appellant.

WILLIAM A. MAIB, *Appellant*, v. THE ÆTNA MILL &  
ELEVATOR COMPANY, *Appellee*.

No. 16,565.

SYLLABUS BY THE COURT.

**MASTER AND SERVANT—Injury to Employee—Vice Principal or Fellow Servant—Neglect of Absolute Duty by the Master—Question of Fact.** A mill company desired to remove a Corliiss engine weighing 6600 pounds out of the mill basement and across a street occupied by railroad tracks laid in a cut. A wooden trestle was constructed, upon which the engine was moved and upon which workmen were required to stand to assist in moving it. The trestle was built by a miller and a number of men employed in various capacities about the mill, from an abundant stock of sound material supplied by the company. The men were allowed no discretion as to the plan of the structure, the selection of the material or the adjustment of the pieces. Every detail of the work was performed under the authority, direction and control of the miller. The trestle collapsed, owing to faulty construction, and one of the workmen standing upon it was injured. *Held:* (1) Liability on the part of the company for the injury can not be predicated upon the superior rank and authority of the miller, but must rest upon the breach of some nonassignable duty. (2) The duty of the master depended upon what it undertook to do and did do in the premises. If it merely directed the removal of the engine, and left its employees free to exercise their own judgment and discretion and produce the ultimate result in their own way, the duty consisted in furnishing sufficient sound material and competent servants. If the master reserved to itself the erection of the trestle, and undertook to supply a completed structure for use by those who were to move the engine, the duty consisted in using reasonable care to make the trestle reasonably safe for the purpose it was designed to subserve. (3) The question which of the two courses indicated was adopted was one of fact, to be determined from the evidence by the jury. (4) In determining a question of this character the important considerations are: the nature of the structure, the purpose it subserves, the necessity or otherwise for expert supervision, the qualifications of the workmen for the service required, the relation of the work to their usual employment, the extent to which they are allowed to act upon their own responsibility and the free-

---

Maib v. Mill Co.

---

dom of choice permitted them as to plan and method and means and result. (5) Under the facts as outlined above, and others stated in the opinion, a jury might reasonably infer that the mill company built the trestle and supplied it to the workmen for use as a completed structure.

Appeal from Sumner district court; CARROLL L. SWARTS, judge. Opinion filed June 11, 1910. Reversed.

*D. M. Dale, S. B. Amidon, James Lawrence, and Levi Ferguson*, for the appellant.

*W. P. Hackney, and Ed T. Hackney*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The plaintiff was injured while in the performance of his duties as an employee of the defendant. In an action for damages a demurrer was sustained to his evidence and judgment was rendered against him. The ground of the decision was that the injury was occasioned through the act of a fellow servant, and not through the negligence of the defendant. The plaintiff appeals.

The defendant undertook to move a Corliss engine weighing 6600 pounds out of the basement of its mill and across an adjacent street occupied by railroad tracks. The railroad tracks were located in a cut some three feet deep, and a crib, or trestle, was built to carry the engine over them. While the engine was on the trestle one of the timbers of which the structure was composed gave way, the engine was precipitated to the ground, and the plaintiff, who was assisting in guiding its movements, sustained an injury which necessitated the amputation of one of his legs.

H. G. Hackney was president and manager of the mill company. E. N. Perkins was a miller. A new engine was to be installed in the basement of the mill, which necessitated the dismantling and removal of the old one. The basement was six or eight feet deep, and an inclined trestle, perhaps twenty feet long, was built

to raise the old engine out of the mill. The street trestle was some thirty feet long. The engine was jacked up, put on gas-pipe rollers, and drawn over the trestle by means of a crab device set up on the bank across the street from the mill. The work was done by Perkins and a number of men employed in various capacities about the mill. One of these men was a fireman, another was a flour packer, another a second engineer. The plaintiff was a roustabout, assigned to no particular duty. From the inception of the work until disaster overtook it none of these men was permitted any individual initiative or discretion whatever. They were so many pieces moved by the dominating mind and will of Perkins, and Perkins alone. Nobody else connected with the company exercised any sort of authority, direction or control. The supervision of Perkins extended to the minutest details of the work. He picked out of piles of timber the pieces to be used and marked them with chalk, led the men to the piles of timber and showed them the pieces to be taken, directed when a plank and when a square timber was to be placed in the trestle, and supervised the adjustment of each piece, whether it was built into the trestle or bedded in the bank. He gave the orders in reference to the rope crab, directed the conduct of the men working it, and at the same time controlled the movements of the men at the engine, telling them when to move and when to block, when and how to adjust the rollers, and he assigned to each man his part. He was everywhere about the work. Nothing was done by others until he gave the order, and nothing was done by others except in the way he directed. Meanwhile he carried timbers, adjusted rollers and did other work, like the men whose activities he was guiding.

The negligence charged was that a span of the street trestle was built of flat timbers not themselves strong enough to bear the weight of the engine, and that they were insufficiently supported. It was not alleged that

Perkins, who it was claimed was a vice principal, was incompetent. The defendant argues that it furnished sound material and capable men, that these men, working together to a common end, adopted their own plan, selected their own timbers and adjusted such timbers in their own way, and consequently that as master the defendant discharged its full duty. The plaintiff weaves into his argument the conception that because Perkins was a foreman with authority to give orders and directions about the work which the plaintiff and others inferior in rank were bound to obey the defendant must respond for Perkins's negligence. This doctrine has been distinctly repudiated in the case of *Bridge Co. v. Miller*, 71 Kan. 13, followed recently in the case of *Lunn v. Morris*, 81 Kan. 94. Liability on the part of the defendant can not be predicated upon the superior rank and authority of Perkins, but must rest upon the breach of some nonassignable duty. What was the nature of the defendant's duty in this case?

The answer to the question just propounded depends upon what the defendant actually assumed to do and did do. If in fact it merely directed the engine to be taken out of the mill and across the street, and left the men detailed to do the work free to exercise their own judgment and discretion and produce the ultimate result in their own way, then the master discharged its duty to the plaintiff when it furnished sufficient sound material and competent servants. On the other hand, if the defendant reserved to itself the construction of the trestle and supplied it in a finished state to the plaintiff and his associates as an instrumentality for their use in moving the engine, just as the defendant might have imported into the scene a gang plank and turned it over to the men, then the principle making the defendant responsible for the condition of the instrumentality applies. This preliminary question must be answered before it can be known by what rule the defendant's liability is to be measured. It is a question



of fact, and must be determined from the evidence by the jury. Therefore the real inquiry on this appeal is whether there was any evidence that the defendant took the building of the trestle into its own hands and out of the hands of the plaintiff and his associates, so that the completed structure was the defendant's own device. The court is of the opinion there was evidence from which such an inference might reasonably be drawn. Therefore the cause should have been submitted to the jury, under appropriate instructions.

In cases of this character the important considerations are: the nature of the structure, the purpose it subserves, the necessity or otherwise for expert supervision, the qualifications of the workmen for the service required, the relation of the work to their usual employment, the extent to which they are allowed to act upon their own responsibility and the freedom of choice permitted them as to plan and method and means and result. It must always be borne in mind that the duty rests upon the master to furnish his servants a reasonably safe place in which to work and reasonably safe instrumentalities with which to work. Whenever the master is relieved from this obligation it must be because of some exceptional state of facts. An exception is often permitted when the employee himself makes his own place or instrumentality, as an incident to and part of the work he is set to do. This is because the matter necessarily falls by nature within the scope of his employment and is a genuine part of the work which he assumes to understand and has the skill to execute, so that a fair understanding may be implied that he is to pick out his own material from the stock supplied and adjust it in his own way to meet his own needs; and if a corps of such men work together in a common employment to a common end each one knows that he is to rely upon the skill and care of his fellows. But when these conditions are absent the exception is not allowed and the primary obligation of the master

subsists in full force. A common case in which the burden is cast upon the employee is that of a carpenter who makes his own scaffolds as the building he is erecting rises from the foundation. The defendant considers the analogy complete between such a case and the one under decision. Ordinarily the need for scaffolds depends on the progress the carpenter is making with the house. House and scaffolds grow up together. The carpenter knows best what he should have and when he should have it. The work itself is part of his trade. He is familiar with the material he must use, knows definitely what weight the scaffold must sustain, has had experience enough to know the quantity and quality of material necessary to bear that strain, and knows how to plan the scaffold and adjust the material. He is not only familiar with all the requirements of the situation, but the whole matter is one which it is advantageous to leave to his knowledge, judgment and skill, and the common custom is to leave him free to act according to his own discretion as the changing aspects of the advancing work demand. In such a case he must vouch for the safety of the scaffold he builds or which is built by a comrade in the same work. The principles involved were clearly stated by Judge Shiras in *F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 309:

"On [the] part of the company it is claimed that the scaffold was of such a character that it comes within the exception to the general rule which relieves the master from liability for stagings or scaffoldings erected by laborers who are to work thereon, and wherein it is held that the master's duty is performed if suitable materials are furnished for the erection of the scaffold. This exception originated in cases wherein a servant, such as a bricklayer, mason, carpenter or the like, undertakes the performance of some work, like the erection of a wall, shingling a roof or painting a house, which of necessity requires the construction of a scaffold or staging upon which the workmen may stand when engaged at work, and wherein it is customary for the master to furnish the materials and the mechanics to actually construct therefrom the

staging necessary for the work. In this class of cases the workmen will know the extent of the burden to which the staging will be subjected and they are at liberty to make the same as strong as they deem necessary. The method of the construction of the scaffold is under their control, and they have the necessary knowledge of the strain it will be subjected to when in use to enable them, by the use of due care on their own part, to safely construct the same; and under such circumstances, if the scaffold proves to be insufficient, it will be due to the lack of proper care on the part of the workmen, assuming that the master has exercised due care in furnishing safe materials for the construction of the staging. In such cases the master is relieved from responsibility, not because the place where the workmen are employed is a scaffold simply, but because the master did not in fact undertake to furnish the scaffold for the use of the workmen when in his employ." (Page 313.)

The conditions in this case are wholly dissimilar. The building of the trestle was not a mere collateral incident to the prosecution of a principal work of the same general class. It bore a definite character of its own, as different from the work subsequently to be performed upon it as the building of a railroad bridge is different from the operating of trains over it when completed. The trestle served not merely as a place where men were to stand while at work, but it was required to support a ponderous and unwieldy body in irregular motion, subject to shock, vibration, instability of equilibrium, concentration of weight, and other fortuities. In view of the danger to life and limb and property involved, no warrant existed for suffering the trestle to be erected in a haphazard way by rule of thumb. An engineering problem was presented which required special qualifications at least for its safe solution, and technical knowledge and experience in mechanics would not have been amiss. The work of building the trestle did not fall within the usual occupation or the scope of the ordinary employment of a single laborer engaged upon it. Not one of

them professed to comprehend the task or the means by which it was to be accomplished. Probably no one of them could have approximated the weight of the engine, or the strain a single piece of timber used in the trestle would bear. Not one of them was in fact permitted to exercise the slightest judgment or choice or freedom of action in any particular, and there is nothing in the evidence to indicate that any one of them was charged with any responsibility whatever for the efficiency of the completed work. All the knowledge and skill and judgment and authority that was suffered to be displayed or that was displayed resided with Perkins, who personally and alone planned and superintended and directed and controlled. Under these circumstances the jury might well have concluded that the defendant did not trust the building of the trestle to the heterogeneous squad of men who moved as Perkins ordered, but that it erected the structure itself. The plaintiff testified that he knew no more about building a trestle than a child and was wholly incapable of passing judgment upon this one. He played virtually a dummy part in its construction, and consequently his participation did not absolve the defendant from its duty toward him.

The principles involved are discussed at length in section 614 *et seq.* of volume 2 of Labatt on Master and Servant, where many decisions are cited and numerous extracts from the opinions are quoted. The same matter appears as a note in 54 L. R. A., beginning at page 142. A good statement and application of the doctrine by a former circuit judge, now Justice Lurton, appears in the case of *Chambers v. American Tin Plate Co.*, 64 C. C. A. 129:

"There is a line of cases holding that when the employer furnishes suitable materials, and the workmen themselves construct a scaffolding or staging as a part of the work which they undertake to perform, and build it according to their own judgment, that the employer is not liable for an injury to one of their own

number sustained in the subsequent use of the structure, in consequence of negligence in construction. The erection and reërection of such a staging as the work requiring its use progresses, being itself a part of the very work which the employees are to do, takes it without the general rule in respect to the duty of the master to exercise reasonable care to furnish a reasonably safe place and appliances. . . . But the rule is quite otherwise if the employer himself undertake to furnish such scaffolding for the men who are to work thereon. In such case the duty is one of those positive duties of the master toward the servant which can not be discharged by the substitution of a competent agent. The act or service to be done is that of furnishing a reasonably safe place or appliance, and negligence in the doing of such a service is the negligence of the master, without regard to the rank of different employees. . . . In the case at bar there was no evidence tending to show that the masons, for whose use the scaffold in question was made, undertook to furnish, or build, or construct their own staging, and no evidence that it was customary for such workmen, directly employed each for himself, to build their own scaffolds. On the contrary, there was evidence tending to show that the defendant had employed one Frampton as boss carpenter to erect such scaffolding as should be needed, and to do such other carpenter work as should be needed in the progress of the building. There was evidence, therefore, from which the jury might reasonably infer that the defendant undertook to furnish all necessary scaffolding, and that it had in fact supplied a completed structure for the use of the plaintiff and his fellow masons. Whether we regard a mason's staging as a place to stand and do his work or as an appliance for the doing of his work is not very important for the purposes of this case. If an obligation to furnish such staging was assumed by the defendant, it was bound to exercise reasonable care to furnish an appliance reasonably safe and suitable for the purpose." (Pages 130, 131.)

The case of *F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 309, already quoted, is a leading authority. In that case a scaffold was necessary, not only as a place on which the workmen on a bridge might stand, but as

---

Maib v. Mill Co.

---

a support for the superstructure of the bridge while it was being put together. The scaffold was built by workmen who had no control over its construction but who acted under the direction of a skilled superintendent placed in charge by the manufacturing company. A portion of the opinion reads as follows:

"The liability of the master can not be determined simply by showing that the place where the workmen were engaged in his service was a scaffold, but it must depend upon the nature of the scaffold, the purposes it is to subserve; whether it could be properly left to the workmen to determine and control the method of its erection; whether they did in fact control its erection, or whether the master had charge thereof.

"In the case at bar the scaffold was intended, not only as a place whereon the workmen were to stand, but as a support upon which was to be placed the entire superstructure of the bridge during the course of its erection. If it should fall, through faulty construction, it might cause the entire or partial destruction of the steel work furnished by the company, and the company would be compelled to make good all damages thus caused. It is clear that such workmen as the defendant in error could not be expected to know the strain that would be placed upon this scaffold in the erection of the steel superstructure. It is equally clear that it would not have been open to the defendant in error to exercise any control over the method in which the scaffold was erected, or the material used in its construction. The purpose for which this scaffold was to be used renders inapplicable the reasons upon which the rule is based, that ordinarily the master is not responsible for the safety of stagings which the workmen put up as aids in carrying out the particular work they are employed to perform. The use to which it was intended to subject this structure, in that there would be placed thereon, not only the dead weight of the material composing the bridge, but also the strain caused by placing the different parts in proper position, clearly shows that the erection of the staging was not a matter that could be safely left to the control of ordinary laborers, but required skilled control by persons who, from experience, would know what strain would be placed on the staging; and the evidence shows that

---

Mosiman v. Benefit Association.

---

in its erection the defendant in error exercised no control or judgment, but, on the contrary, it was erected solely under the direction of Charles Killifer, who, as a skilled expert, had been sent out by the company to erect the bridge and settle for it with the county authorities." (32 C. C. A. 309, 314.)

The judgment of the district court is reversed and the cause is remanded for a new trial.

---

NOBIA K. MOSIMAN, *Appellee*, v. THE OCCIDENTAL  
MUTUAL BENEFIT ASSOCIATION, *Appellant*.

No. 16,567.

SYLLABUS BY THE COURT.

1. **FRATERNAL INSURANCE—*Payment of Assessment Diverted to Another Purpose.*** Where the officer of a local lodge to whom the assessments of a fraternal insurance order are payable pays an assessment for one of the members, a later incumbent of the office has no power to divert money paid by the member upon a subsequent assessment to reimbursing his predecessor for the amount so advanced.
2. ——— ***Waiver of Health Certificate Required before Reinstatement—Acceptance of Delinquent Dues.*** Where the by-laws of a fraternal insurance order provide that the failure to pay an assessment when due of itself causes an immediate forfeiture of membership, and that reinstatement can be effected only by the payment of all arrearages within a fixed time, accompanied by a certificate of good health, the acceptance by the association of dues from a delinquent member, without exacting any showing as to his physical condition, effects a waiver of the requirement in that regard.
3. ——— ***Adoption of Act of Local Officer—Waiver of Health Certificate.*** Where the officer of a local lodge of such an order to whom assessments are payable accepts a delinquent payment without requiring a certificate of good health, whether or not a waiver is effected in the first instance, his act is adopted by and becomes binding upon the association where the general secretary receives the money and notifies the beneficiary, after the death of the insured, that the payment was unavailing,

---

Mosiman v. Benefit Association.

---

giving no reason except the mistaken one that the amount was insufficient.

4. ——— *Notice of Physical Condition of Delinquent—Acceptance of Dues—Reinstatement.* The fact that the delinquent member is not in good health, the association having no knowledge of his condition, does not prevent the acceptance of his money from effecting a reinstatement, in the absence of any false representations or fraudulent concealment.

Appeal from Saline district court; **ROLLIN R. REES**, judge. Opinion filed June 11, 1910. Affirmed.

*F. D. Blundon*, and *David Ritchie*, for the appellant.  
*J. O. Wilson*, and *Frank T. Knittle*, for the appellee.

The opinion of the court was delivered by

**MASON, J.:** The Occidental Mutual Benefit Association appeals from a judgment rendered against it upon a benefit certificate issued to **A. E. Mosiman**, payable to his wife. Special findings were made showing these facts: The by-laws of the association provided that the failure to pay an assessment when due, at once and of itself effected a forfeiture of membership, and that a suspended member could be reinstated, if in good health, by paying all arrearages within sixty days and delivering to the secretary of the local chapter, to be forwarded to the general secretary, his own written statement that he was at the time in sound bodily health. Assessments were due on the first of each month. Mosiman failed to pay that of July 1, 1907, known as No. 89, but the local secretary, to whom it should have been paid, advanced it for him to the grand chapter. He paid nothing further until August 28, when he sent the amount of two assessments to a new local secretary, who had just been elected. This secretary gave half of the money to the previous incumbent by way of reimbursement for the assessment advanced, and forwarded the other half to the grand chapter, sending Mosiman receipts reciting the payment of as-



---

Mosiman v. Benefit Association.

---

sessments numbered 89 and 90. Mosiman was ailing at the time, but was not deemed to be in a dangerous condition, although he was in fact suffering from what proved to be his last illness. He died September 6, 1907. His widow notified the grand chapter of his death and of her claim under his certificate. On September 23 the grand secretary wrote her as follows:

"We regret that we are compelled to notify you that the membership of Companion Mosiman was suspended on monthly payment No. 90 and has not been reinstated. Our records show that since suspension he has paid No. 90 and was remitted on the report for No. 91. This did not reinstate his membership, as it was necessary in order to have his membership in good standing at the time of his death to have monthly payment No. 91 paid up, so that he stood suspended on our records since August 1."

None of the money paid by Mosiman was returned, but in the answer filed in the action the defendant offered to pay into court the amount of the last payment, for such disposition as might be ordered.

In advancing for Mosiman the assessment due July 1 the then secretary merely lent him the money and became his creditor for the amount. The new secretary had no authority to divert any part of the subsequent remittance to the satisfaction of this personal indebtedness. Therefore the last payment by Mosiman covered all the assessments that had not been previously paid and that matured prior to his death. It was made to the officer who was designated by the association to receive it, who was the agent of the association for that purpose, and whose diversion of a part of it from the use intended by the payer could not prejudice his rights. (*Pyramids v. Drake*, 66 Kan. 538; *Fraternal Aid Association v. Powers*, 67 Kan. 420; *Benefit Association v. Wood*, 78 Kan. 812.) The question to be determined is whether under the circumstances stated the association shall be held to have waived the requirement that he should present a certificate of good health before rein-

---

Mosiman v. Benefit Association.

---

statement after the forfeiture of membership resulting from the defaulted assessment of August 1. "The receipt and retention of money paid to the benefit society by one of its members on an overdue assessment is ordinarily sufficient to waive a forfeiture arising from the failure to pay the assessment when due." (*United Workmen v. Smith*, 76 Kan. 509, syllabus.) The unconditional acceptance of a payment by one having authority to waive the other requirements necessarily results in reinstatement. (29 Cyc. 194; *Reed v. Bankers Union*, 121 Mo. App. 419.) Whether the act of a local officer who accepts a past-due assessment without exacting a compliance with the by-laws in other respects is binding upon the association is a question upon which the decisions are in conflict. (4 L. R. A., n. s., 421, note; 2 Bacon, Ben. Soc. & Life Ins., 3d ed., § 434a.) On the one hand it is argued that although the local officer is the agent of the association his authority is limited by the by-laws, of which every member must take notice, and which he is powerless to waive. On the other it is urged that as the member can not deal directly with the general officers a payment made to and retained by a local officer should be deemed, so far as the rights of the member are concerned, to have been accepted by the association. The question suggested need not now be determined. When the local secretary received the two assessments, unaccompanied by a certificate of good health, the effect may not have been to reinstate Mosiman at once. But when the general secretary in his letter of September 23 acknowledged the payment of one of the two delinquent assessments, and objected to the reinstatement solely upon the untenable ground that there still remained a delinquency of one assessment, he adopted the act of the local secretary in receiving the money, and thereby waived any right the association may have had up to that time to complain of the want of a health certificate. (29 Cyc. 198.)

It has been held under similar circumstances that the acceptance of payment from a member under suspension, without knowledge of his illness, can not effect a waiver. Thus in *Knights of Pythias v. Quinn*, 78 Miss. 525, it was said:

"The insured had . . . forfeited his membership in the order, and . . . when he sent forward his dues for reinstatement he was seriously sick, in fact on his deathbed, and the laws of the order only authorized his reinstatement upon satisfactory evidence of his good health. In the letter accompanying the remittance of his dues there is not a syllable relating to his health. In this state of the case there could be no reinstatement . . . to membership in the order, by the mere payment of his past dues, without knowledge of his physical condition, and the claim of his beneficiaries to his reinstatement is groundless. A waiver is defined to be the intentional relinquishment of a known right, and it implies an election of the party to forego some advantage which he might have, at his option, insisted upon. There must be both knowledge of the existence of the right and an intention to relinquish it." (Pages 530, 531.)

And in *United Order of the Golden Cross v. Hooser* (Ala. 1909), 49 South. 354:

"Assuming . . . that the disconnection of the insurant (caused by nonpayment of dues) might be waived by a subsequent acceptance of the unpaid dues, yet if . . . the insured was physically unfit for membership in the order (a fact . . . unknown to defendant, but known to the insurant, at the time the dues in arrears were received), and if . . . with knowledge of the insurant's physical condition the dues would not have been received, we fail to see how it could be righteously or legally adjudged that the waiver of the forfeiture was effected by receiving the dues under such circumstances." (Page 357.)

We do not find this reasoning convincing. True, when the association accepted the delinquent assessments it had no knowledge that Mosiman was sick when he paid them, but it did know that the certificate of health which it had a right to require had not been fur-

nished, and in waiving the prescribed showing in that regard it waived all inquiry into the member's physical condition. Of course, if it had been misled by any false representation or fraudulent concealment a different situation would be presented. (*Spitz v. Mutual Ben. Life Ass'n*, 25 N. Y. Supp. 469, 472; *Rice v. New England Mutual Aid Society*, 146 Mass. 248.)

The judgment is affirmed.

---

T. J. ROLL *et al.*, *Plaintiffs*, v. JAMES M. NATION, *as Auditor, etc.*, *et al.*, *Defendants*.

No. 16,568.

SYLLABUS BY THE COURT.

1. SCHOOL LAND—*Invalid Forfeiture—Rights of Assignee of Original Purchaser*. After an attempted forfeiture of a sale of school land a person who, relying upon the regularity and validity of the forfeiture proceedings, purchases the land, and afterward ascertains that the forfeiture is invalid, may take an assignment from the former purchaser and perfect his rights to the land under such former certificate.
2. ——— *Forfeiture—Notice—Assignee—"Purchaser."* Where a purchaser of school land assigns the certificate and the assignment is brought to the knowledge of the county clerk, who enters it upon the records of his office, the assignee will thereafter be deemed to be a "purchaser" within the meaning of the statute providing for forfeiture proceedings; and in such proceedings notice must be served upon him as the statute directs.
3. ——— *Notice of Forfeiture Issued Only to Assignor—Second Sale Invalid*. Where in proceedings to forfeit the sale of school land the notice is issued to a person who is shown by the record in the county clerk's office to have assigned his interest in such land to another, and no steps are taken to give notice to the assignee or to any one holding under him, the proceedings can not be upheld and a subsequent sale will be held to be invalid.
4. ——— *Patent—Assignee—Mandamus*. Where in such a case

---

Roll v. Nation.

---

a purchaser who buys the land in good faith, relying upon the regularity and legality of the forfeiture proceedings, subsequently ascertains that such proceedings are invalid, and obtains an assignment of the former certificate of sale and completes the purchase thereunder, he will be entitled to a patent to the land; and it will be the duty of the state auditor to make the proper certificate authorizing such patent upon demand.

Original proceedings in mandamus. Opinion filed June 11, 1910. Writ allowed.

*T. F. Garver*, and *R. D. Garver*, for the plaintiffs.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, and *Charles D. Shukers*, special assistant attorney-general, for the defendants.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced in this court by T. J. Roll and Oscar Roll for a writ of mandamus to compel the state auditor to make the proper certificate to enable them to obtain a patent for certain school land which they have purchased and paid for, as prescribed by law. It has been made to appear that E. P. Williams purchased the land in question on October 13, 1884. In the following November he assigned the certificate to Gust Carlander. The assignment was duly reported to and recorded by the county clerk of Pratt county, where the land is located. Carlander held the land for ten years, during which time he regularly paid the interest on the deferred payments. He assigned the certificate to the McPherson National Bank, and it assigned to Charles H. Williams, who assigned to the petitioners herein. The petitioners paid the balance of the purchase money in full, and the county clerk duly indorsed upon the certificate that the purchase price had been fully paid and the holders of the certificate were entitled to a patent to the land. The petitioners presented the certificate so indorsed

to the state auditor, and demanded that he indorse it as required by law in such cases, so that a patent to the land could be obtained by them. The auditor refused to make the necessary indorsements, for the sole and only reason that the sale to E. P. Williams had been forfeited and the land had been again sold.

It appears that steps were taken to forfeit the sale to Williams, and upon the assumption that the forfeiture was valid and in compliance with the law the land was again offered for sale. The petitioners were in possession of the land, purchased at the second sale, and received a certificate of sale therefor in 1903. In 1907 Charles H. Williams, then the owner of the certificate under the first sale, commenced an action of ejectment in the federal court against these petitioners, who were then claiming the land under the second sale. In that action it was claimed by the plaintiff that the forfeiture of the first sale was invalid. The petitioners were informed by counsel that their title under the second sale was defective, and were advised to make terms with Williams and secure the rights held by him. They thereupon, for the purpose of securing peace and security in the possession of the land and improvements, obtained an assignment from Williams and his wife of all their right, title and interest in the land. The auditor informed the petitioners that they would be compelled to pay up under the last sale before they could obtain a patent to the land.

We think the forfeiture proceedings were invalid, and therefore the petitioners have a right to a patent under the first sale, having paid the purchase price in full. The county clerk did not issue a notice of forfeiture to the owner whose name appeared of record, but such notice was issued to E. P. Williams, who was known to have parted with his right to the land and had no further interest in it. It appeared from the record that Gust Carlander was the owner. No effort was made to give notice to him, or to his heirs, or to

anyone who might be holding under him. On the contrary, a notice was issued to a person known to have no interest in the land. Such a notice was not only useless, but was misleading to persons unacquainted with the facts. An assignee of a purchaser, when the assignment has been reported to and recorded by the county clerk, takes the place of the former purchaser, and must be dealt with in forfeiture proceedings as the purchaser. (*Oberlin Loan Co. v. Flinn*, 58 Kan. 83.) Under section 6356 of the General Statutes of 1901 (Laws 1879, ch. 161, § 2) notice of forfeiture must be issued to the purchaser. At the time of the attempted forfeiture the plaintiffs were in possession of the land as tenants of the McPherson bank, which was then the owner of the land. The proceedings were clearly not in compliance with the law, and therefore the forfeiture is invalid.

The first sale must be upheld, and the petitioners are entitled to a patent. The auditor ought to comply with their request in the premises. (*Hickert v. Van Doren*, 76 Kan. 674.)

The writ is allowed.

BENSON, J. (dissenting): The notice of forfeiture was directed to Williams, the purchaser, and to all others concerned. Williams had assigned the certificate and the assignment was recorded before the notice was issued, but Carlander, to whom it was assigned, had also assigned it to the bank and had died before the issuance of the notice. The idle ceremony of directing a notice to a dead man was not required by the statute, nor for any good reason, and certainly it should not have been directed to his heirs, for they had no interest in the land. The owner of the certificate at that time was a bank of another county, and Williams could not be found within the county. Roll, the tenant of the nonresident owner, was in possession of the land. In these circumstances service of the notice was properly

---

Mill Co. v. Kramer.

---

made upon such tenant. No other service, even if possible, was required. (Laws 1879, ch. 161, § 2; Gen. Stat. 1901, § 6356; Laws 1907, ch. 373; Gen. Stat. 1909, §§ 7692-7696.)

The forfeiture seems to have been complete, and the auditor's decision right.

Mr. Chief Justice JOHNSTON concurs in this dissent.

---

THE ÆTNA MILL AND ELEVATOR COMPANY, *Appellant*,  
v. THE KRAMER MILLING COMPANY, *Appellee*.

No. 16,570.

SYLLABUS BY THE COURT.

TRADE-MARKS—*Right to Use of One's Own Name.* A person will not be prohibited from using his own name upon marks or brands placed upon articles of his own manufacture merely because it has first been rightfully used by another, who has established the reputation of, and built up trade in, like articles by the use of the same name in a trade-mark, sign or label thereon; but such person will not be permitted by any artifice or device, or otherwise, to induce the belief of customers or others desiring to purchase that the articles so marked are the products of the other.

Appeal from Harper district court; PRESTON B. GILLET, judge. Opinion filed June 11, 1910. Reversed.

*W. P. Hackney, J. T. Lafferty, and Ed T. Hackney,* for the appellant.

*Fred Washbon, and E. C. Wilcox,* for the appellee.

The opinion of the court was delivered by

BENSON, J.: The petition in this case alleged that prior to January 1, 1905, J. E. Kramer and S. P. Kramer had owned and operated the Ætna mills at Wellington, under the name of Kramer Brothers,



and manufactured there several high grades of flour, which were extensively advertised, and the brands thereof had become generally known over this country and Europe and the reputation thereof was such that a ready sale was obtainable therefor; that in establishing this reputation the name "Kramer" or "Kramer Brothers," coupled with the grades to which they were attached, became a distinguishing mark, whereby any flour having such names met with ready sale; that on the date named Kramer Brothers sold their business to the plaintiff by bill of sale, describing the property, with this addition: "also our flour brands, trade-signs, mottoes, and the full and entire good will of our business"; that "Kramer's High Patent" is one of the trade-marks and brands so bought by the plaintiff, and a copy of that brand as used on flour sacks is shown by "Exhibit B," attached to the petition (other brands are referred to and shown in other exhibits); that the plaintiff, after such purchase and after it had registered such brands and trade-marks, continued to manufacture and sell these brands of flour, and the commodities so designated have acquired a great reputation, are well known to the public and to buyers by such names and trade-marks, and the business is a source of great profit to the plaintiff; and that in June, 1905, J. E. Kramer and S. P. Kramer, the former "Kramer Brothers," organized the defendant company, purchased mills at Anthony, and proceeded to manufacture flour. The following allegation is then made:

"The plaintiff further avers that the defendant, well knowing the plaintiff's rights in and to all said brands and trade-marks so purchased and owned by it as aforesaid, since the month of July, 1905, in disregard of the plaintiff's rights, makes and offers for sale and sells, and still makes and sells, a similar article, an imitation of plaintiff's said articles of flour and meal, well knowing that the same is an imitation of the plaintiff's said

---

Mill Co. v. Kramer.

---

flour and meal, and well knowing of the rights of the plaintiff to the trade-marks and brands as aforesaid, which it puts up, similar to that of the plaintiff, and has labeled with plaintiff's said trade-mark and brand and with labels similar to that of plaintiff, using the word "KRAMER," which marks and brands so used by the defendant to deceive the public as aforesaid are attached to the original petition on file herein, marked "Exhibit K" and "L," and the same are here referred to and made a part of this amended petition; that said imitation was calculated to deceive and does deceive buyers of said article and the public, and has induced many persons to purchase defendant's article in the belief that it was made by the plaintiff, thereby greatly diminishing plaintiff's profits."

Allegations of damages and averments appropriate for an injunction follow, with a prayer for relief accordingly. A demurrer was sustained to the petition, and the plaintiff appeals.

The following is the inscription upon one of the brands so sold, as shown by "Exhibit B":

Æ T N A  
P L A N S I F T E R  
M I L L S

[Picture of Mill]

KRAMER'S  
HIGH PATENT

—  
KRAMER BROS.,  
WELLINGTON, KAN.

—  
24 lbs. KRAMER'S  
HIGH PATENT Flour.

Exhibits "K" and "L" are inscriptions upon packages of flour made by the defendant company which it is alleged are used in violation of the plaintiff's rights.

---

Mill Co. v. Kramer.

---

Upon one side of the sack is the mark, or brand, designated as "Exhibit K," as follows:

KRAMER'S  
CHANCELLOR.  
HIGHEST PATENT.  
KRAMER MILLING COMPANY.  
ANTHONY, KANSAS.

---

49 lbs. CHANCELLOR Flour.  
HIGHEST PATENT

The word "Chancellor" is in large display letters in white, upon a blue band, printed diagonally across a red shield. This symbol and the word "Kramer's" above it in large letters are the most prominent features of the brand. On the reverse side of the sack is the inscription or brand marked "Exhibit L," as follows:

THIS IS THE GENUINE  
"KRAMER'S" FLOUR.  
Every sack guaranteed.  
If  
This Sack Does Not Give Perfect  
Satisfaction Bring It Back  
And Get Your Money.

The words in the first and second line are the most conspicuous feature in this inscription.

The petition states facts sufficient to constitute a cause of action, unless from the exhibits which show precisely the marks and brands complained of it appears that their use by the defendant is not a breach of any duty or obligation on its part. The exact question then is whether the exhibits "K" and "L" are brands that the defendant can not lawfully use after having

made the sale to the plaintiff of the mill, good will of the business, flour brands and trade-signs.

It will be noticed that apart from the words "Kramer's" and "Highest Patent" there is little in "Exhibit K" that resembles the "Kramer's High Patent" label or trade-mark. The word "Chancellor" in display letters upon a red shield is entirely dissimilar from anything appearing upon the brand sold to the plaintiff. On the other side of the sack, however, is the inscription, marked "Exhibit L," "This is the genuine 'Kramer's' flour," in conspicuous letters, the words "'Kramer's' flour" being displayed in red in a manner that would at once attract notice. The prominent word "Kramer's" is made more significant and challenges greater attention by being placed in quotation marks. Why was this done if the word was innocently used as pertaining to the defendant's corporate name only? These matters, in connection with the inscription "Kramer's Highest Patent" on the other side of the sack, might well indicate to a purchaser desiring to buy that the sack contained the well-known product of the Ætna mills, sold under the brand of "Kramer's High Patent," shown in "Exhibit B."

The discussion in the briefs has taken a wide range, covering cases of piracy, so-called, in the wrongful use of trade-marks, and of unfair competition in the wrongful use of labels, wrappers, packages, etc., which, although analogous, still differ from the technical trade-marks. The principles that govern these different subjects are similar, however, and for the purposes of this discussion need not be precisely distinguished. The plaintiff clearly had the right to purchase the labels in question, and acquired by such purchase, in connection with the establishment and its good will, the legal rights of the Kramers to use them before the sale, and must be protected to the same extent that they might have been.

Mr. Justice Field said, in *Kidd v. Johnson*, 100 U. S. 617:

"When the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it." (Page 620.)

In *Brown Chemical Co. v. Meyer*, 139 U. S. 540, it was said:

"There are a few cases indicating that the mere right to use a name is not assignable, notably *Chadwick v. Covell*, 151 Mass. 190, but none that it may not be assigned to an outgoing partner or to a successor in business as an incident to its good will." (Page 548.)

In *Ball v. Broadway Bazaar*, 194 N. Y. 429, the rights incident to trade-marks and analogous rights in trade names were discussed. The court said:

"Although we agree with the learned appellate division in recognizing the technical distinction between trade-marks and trade names, we think the same fundamental principles of law and equity are applicable to both. 'All such cases, whether of trade-mark or trade name, or other unfair use of another's reputation, are concerned with an injurious attack upon the good will of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to the other.' (Seb. L. of Trade-marks, p. 17.) Trade-marks and trade names are in reality analogous to the good will of the business to which they appertain. The trade-mark represents it in the market and the trade name proclaims it to those who pass the shop. In either case such unfair conduct as is calculated to deceive the public into believing that the business of the wrongdoer is the business of him whose name, sign or mark is simulated or appropriated constitutes the gist of the offense." (Page 435.)

A manufacturer who, to designate his goods, has adopted a name or device not subject to appropriation as a trade-mark may still be protected in its use from

unfair competition if the circumstances warrant it. (*Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 91 C. C. A. 363. In *The J. G. Mattingly Co. v. Mattingly, &c.*, 96 Ky. 430, it was held that the brand "J. G. Mattingly & Sons, Standard Bourbon, Est. 1845, Louisville, Ky.," and another brand with the words "Pure Rye" instead of "Standard Bourbon," might be lawfully sold and transferred with the establishment, and its use thereafter by one of the vendors of the same surname was restrained. The court said:

"That their intention was by some device, if not by actual use of the trade name of J. G. Mattingly & Sons, to induce belief that the whisky they contracted for had been made at the distillery in question and according to the formula long used there, and thus defraud and injure plaintiff, is shown by a letter B. D. Mattingly, April 21, 1890, wrote to Jones, Munday & Co., in which he proposed a secret contract for manufacture on joint account of whisky having the Mattingly brand on it. In that letter is this significant language: 'We can use all the Mattingly thunder we want, save the exact brands.'" (Page 438.)

In a leading case on this subject the court of appeals of New York held that the right of a person to use his own name in business notwithstanding the prior use of the name by others does not extend to a corporation of which he is a promoter and member. The court said:

"Whether the court will interfere in a particular case must depend upon circumstances—the identity or similarity of the names; the identity of the business of the respective corporations; how far the name is a true description of the kind and quality of the articles manufactured or the business carried on; the extent of the confusion which may be created or apprehended; and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy." (*H. Co. v. H. S. Co.*, 144 N. Y. 462, 469.)

One may not, in the use even of his own name in connection with a manufactured article, to promote its sale, resort to any artifice to mislead the public, and

thereby induce a belief that the article is the one manufactured by another which has become known to the trade by the particular mark or brand. (*Singer M'f'g Co. v. June M'f'g Co.*, 163 U. S. 169.) In *Russia Cement Co. v. LePage*, 147 Mass. 206, the imitation by one manufacturer of the trade-mark of another, by the use of the same surname as a prefix, was considered. LePage, the defendant in that action, and another had been engaged in the manufacture of glue known as "LePage's Liquid Glue." They used that mark upon cases and bottles, the word "LePage" being the prominent feature. They sold out the business, including the trade-marks, to the Russia Cement Company, a corporation, which thereafter advertised the article extensively under the trade-mark or name of "LePage's." LePage then commenced to manufacture and sell a glue under the name "LePage's Improved Liquid Glue," and described its manufacture as carried on under the management of William N. LePage, the original inventor and manufacturer of "LePage's Liquid Glue." The court said:

"A person can not make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good will of a business already established by others of the name. Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he can not resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. . . . One who has carried on a business under a trade name, and sold a particular article in such a manner, by the use of his

---

Mill Co. v. Kramer.

---

name as a trade-mark or a trade name, as to cause the business or the article to become known or established in favor under such name, may sell or assign such trade name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way." (Pages 208, 209.)

This language was quoted with approval in *Howe Scale Co. v. Wyckoff, Seamans, &c.*, 198 U. S. 118, 136. Other cases involving the transfer of trade-marks, labels, etc., and the rights of vendor and vendee, are collated and discussed in subject notes in 1 L. R. A., n. s., 704, 20 C. C. A. 165, and 30 C. C. A. 376.

There may be relief against others than the vendors, however, in cases of unfair competition by the use of trade-marks, signs and labels. The Sheffield-King Milling Company, a manufacturer of flour in Minnesota, designated the flour made at its mill by various brands, among which were "Sheffield's Best" and "Gold Mine." Its flour was generally known as Sheffield's flour, and the name "Sheffield" was used as part of its trade-marks, trade names and brands, and the name became generally known in the flour trade. Afterward B. B. Sheffield, with others, organized a corporation named the Sheffield Mill & Elevator Company, and proceeded to solicit business from the customers of the Sheffield-King company, representing that it was a successor thereto and making other false representations. B. B. Sheffield was the son of the founder of the business of the Sheffield-King company. In an action by the last-named company against the new company to restrain the latter from this unfair competition in trade, the supreme court of Minnesota sustained an injunction against the new company restraining it, among other things, from using as a trade-mark or trade name or as a part thereof the word "Sheffield," and from representing itself as a successor to the business of the first company. The court said:

"It is apparent that an effort was made by the de-



fendant so to name itself that the business built up by the plaintiff's predecessor, the Sheffield Milling Company, might be attracted by the name 'Sheffield'; that the name of the defendant was fraudulently selected by it for that purpose, and for the purpose of diverting the business of the plaintiff to itself; and, further, that the defendant has been guilty of unfair competition in business with plaintiff. . . . The intent of the promoters, officers and agents of the defendant in adopting and using the name 'Sheffield,' in connection with the business of manufacturing and marketing flour by the defendant, may be inferred from their acts and the circumstances connected with the incorporation of the defendant and the conduct of its business. It clearly appears from the evidence that the name 'Sheffield,' by long use, became and is a valuable trade name, descriptive of the flour made by the plaintiff, and signifies to the commercial world a desirable grade of flour, and, further, that the right to use the name in such connection was sold to the plaintiff by the promoters of the defendant. Upon the evidence in this case, much of which is not disputed, it seems difficult to explain the acts and conduct of the defendant's officers and agents, except upon the theory that they intended the necessary consequences thereof, which were unfairly to deprive the plaintiff of that which it had honestly acquired and paid a fair consideration therefor." (*Sheffield-King Milling Co. v. Sheffield Mill & Ele. Co.*, 105 Minn. 315, 319, 320.)

The same result was reached in the case of *Walter Baker & Co. v. Slack*, 65 C. C. A. 138. Walter Baker & Co. were the manufacturers of "Baker's Cocoa" and "Baker's Chocolate," articles so marked and known and extensively advertised and sold. Other marks and symbols were upon the labels, in connection with these names. Thus the name "Baker's" became associated in the minds of dealers and associates with the product of Walter Baker & Co. Years after the business had been so carried on, William Henry Baker began, in another state, to make and put upon the market chocolate and cocoa products, so labeled as to cause them to be sold and accepted as the goods of Walter Baker & Co.

---

Mill Co. v. Kramer.

---

He was enjoined, and obeyed the decree. Two of the labels of the goods of the party enjoined were "Baker's Best Cocoa," and "Baker's Premium Best Cooking Chocolate," and were sold by a grocer who was made a party to the suit. This party being also enjoined, appealed. Upon that appeal the court said:

"It must not, however, be overlooked that the word 'Baker,' as applied to chocolate and cocoa manufactured by the appellant, had in the course of years come to represent to purchasers the product of Walter Baker & Co., and was so generally known to the trade. The appellee had largely dealt in those products, and was well informed of those facts, prior to the time when he undertook the sale of the product of William Henry Baker's manufacture. It must also not be overlooked that William Henry Baker instituted his business and applied the name of 'Baker' to his products fraudulently, with the expectation of profiting by the trade name of 'Baker,' and in the hope of diverting to himself some part of the trade which legitimately belonged to Walter Baker & Co., Limited. We must therefore deal with the conduct of the appellee in the marketing of this product of William Henry Baker in the light of these circumstances. He had the right, as we assume, to sell that product, but honesty and good faith required that he should not palm it off as the product of Walter Baker & Co.; that he should not represent it as 'Baker's Chocolate' or 'Baker's Cocoa,' for that meant to the purchaser that it was the product of Walter Baker & Co., Limited." (Page 141.)

It was held in *White, Appellant, v. Trowbridge*, 216 Pa. St. 11, that a retiring partner, who had not entered into any contract restricting him from using trade-marks of the firm, should not be enjoined from afterward using trade-marks and labels which were not so similar as to deceive persons of ordinary intelligence using ordinary care. The court approved the following conclusion of the trial court:

"The defendant is not deprived of the right to use his own name in connection with the conduct of his business simply from the fact that his surname is a

portion of the trade-mark used by the copartnership of which he was formerly a member, and whose business has been continued by plaintiffs." (Page 20.)

But the court also approved the following:

"He has no right to use said name for the purpose of misleading the public or to induce persons to deal with him in the belief that they are dealing with or acquiring the product of the old firm, or its successors in business." (Page 20.)

In an extended note in 20 C. C. A. 165, upon unfair competition in trade, which reviews many authorities, it is said:

"The principle which governs in the case to which this note is appended is one which has long been recognized in the courts both of this country and of England. Stated in brief, and in its most comprehensive form, it is that no man has a right to pass off his goods upon the public as and for the goods of another, and thereby work a fraud upon both the public and his rival in trade. This principle is broader than the rules applicable to strict, technical trade-marks, but it is not something separate and apart from trade-mark law. Rather, it may be said, it lies at the very foundation of trade-mark law, and covers, besides, a large field to which some of the technical trade-mark rules do not extend. . . . Independently of the existence of any technical trade-mark, no manufacturer or vendor will be permitted to so dress up his goods, by the use of names, marks, letters, labels, or wrappers, or by the adoption of any style, form, or color of packages, or by the combination of any or all of these indicia, as to cause purchasers to be deceived into buying his goods as and for the goods of another." (Pages 165, 167.)

The defendant company should not be prevented from a just and proper use of its corporate name, although embracing the surname of the Kramers, former proprietors of the Ætna mills; but in such use the defendant can not be allowed, by any artifice or device, or otherwise, to induce customers of the plaintiff or others who may desire to purchase the plaintiff's products to deal with it upon the supposition that they are

---

Bank v. Varner.

---

dealing with, or buying the wares of, the plaintiff. (*Shoe Co. v. Shoe Co.*, 100 Maine, 461; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271; *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.*, 42 C. C. A. 376; *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267.)

The court can not say as a matter of law that the use of the labels shown in exhibits "K" and "L" were such that persons of ordinary intelligence, exercising usual care, would not be misled into the supposition that the flour was that produced by the plaintiff. The petition presented questions of fact whether the brands, labels and methods used by the defendant resulted in unfair competition within the principles stated in this opinion, and therefore stated a cause of action.

The judgment is reversed, with directions to overrule the demurrer and proceed with the cause.

---

NORTHRUP NATIONAL BANK, *Appellee*, v. S. C. VARNER, *Individually and as Receiver*, and THE BANKERS SURETY COMPANY, *Appellants*.

No. 16,571.

SYLLABUS BY THE COURT.

1. RECEIVER'S BOND—*Obligees—Parties Entitled to Sue*. A receiver's bond running to parties named and "all persons interested or having an interest in the property" may be availed of by one who loaned money, upon the order of the court, to care for and preserve the property placed in the custody of the receiver.
2. ——— *Failure to Pay Money as Directed by the Court—Liability of Receiver and Surety*. The bond further provided that the receiver should perform the trust imposed and make due report of his trust to the court, as ordered by it, and make true account of all moneys and property which should come into his hands. *Held*, that when the receiver failed to

---

Bank v. Varner.

---

pay over money in his hands, as directed by the court, there was a breach of the bond, for which the receiver and his surety were liable.

3. ——— *Order of Distribution—Evidence against Surety of Receiver's Default.* The finding and judgment of the court as to payment and distribution of the fund in the action in which the receiver was appointed is competent evidence in the action on the bond to show the default of the receiver and the breach of the conditions of the bond.
4. FEES AND SALARIES — *Receivers — Discretion of the Court.* The compensation of the receiver for his services, when payment of it shall be made, and from what funds, is largely within the discretion of the court by which he was appointed, and it does not appear that there was an abuse of that discretion in this instance.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed June 11, 1910. Affirmed.

*Charles H. Apt*, for S. C. Varner; *T. F. Garver*, and *R. D. Garver*, for the Bankers Surety Company.

*Baxter D. McClain*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by the Northrup National Bank against S. C. Varner and the Bankers Surety Company, the surety on the bond given by Varner as receiver. In an action involving an oil-and-gas lease which included several oil wells, Varner was appointed receiver, and in compliance with an order of the court gave a bond in the sum of \$1000, signed by the Bankers Surety Company. The receiver took charge of the oil wells and other property, and in order to carry out his trust it was found necessary to borrow money. On the authority of the court he borrowed \$300 from the Northrup National Bank and gave a receiver's note for the amount. To meet other demands he obtained authority from the court to borrow a further sum of \$500, and this amount was also obtained from the bank. On the representations of the receiver the

---

Bank v. Varner.

---

court allowed him to borrow more money from the bank and to renew the loans previously made. This was done, and all of the loans were included in a single note, which, with the accrued interest, amounted to \$1150. Subsequently a judgment was rendered in favor of the appellant in the action in which Varner was appointed receiver, and soon afterward the receiver, in pursuance of an order of the court, filed an itemized report, in which he asked \$1740 as compensation for his services, and also other sums for expenditures which he had made. Upon a contest the report was modified to some extent. He was allowed compensation in the sum of \$1400 for his services up to May 22, 1906, and it was provided that he should proceed to close up the trust by September 22, 1906, and that he should receive \$100 per month from May 22 to September 22, 1906. The property remaining was sold on November 14, 1906, for \$1625, and the sale was confirmed. In the final report the receiver charged himself with \$2308.77. He also reported as unpaid claims against the estate his salary as receiver, two small judgments, a claim for attorney's fees, and the amount due the Northrup National Bank. In his report the receiver asked that he be allowed to take his compensation in full out of the money in his hands, but the bank which had loaned the money filed exceptions to the report and asked that the receiver be directed to pay first its claim for the money borrowed from it. A trial was had on the exceptions, and the court found that the receiver had on hand for distribution \$2338.77; that there were claims against the estate due the bank, one for borrowed money and interest thereon, amounting to \$1232.50, an unpaid judgment of \$19.86, another unpaid judgment of \$223, attorney's fees of \$100, and the receiver's compensation up to date of \$2100. It was found that the claims against the estate exceeded the amount of money on hand for distribution in the sum of \$1336.59. The court ordered and adjudged that

the money borrowed from the bank should be first paid, and that the balance of the funds remaining in the receiver's hands should be applied *pro rata* to the claim of the receiver for salary and attorney's fees, and that if any balance remained after the liquidation of these claims it should be applied *pro rata* to the payment of the judgments mentioned. No appeal was taken from this order and judgment. Although subsequent steps were taken to compel compliance with the judgment of the court, the receiver is still in default. The present action was begun against Varner individually and officially, and also against the surety on his bond, and a judgment in favor of the bank resulted.

It is contended by appellants that the bank is not within the protection of the bond. It recites that the obligors "are held and firmly bound unto the said Missouri & Kansas Oil & Gas Company, the Summerset Oil Company, Jacob Geiger and William E. Stringfellow, their successors and assigns, and all persons interested or having an interest in the property." The contention is that "persons interested or having an interest in the property" covers only parties whose property passed into the custody and control of the receiver, and that the bank, which loaned money to the estate, is not within the terms or meaning of the bond. This is too narrow a construction of its provisions. The protection and management of the property or fund was the purpose for which the receiver was appointed. Everyone who contributes to the trust funds, either in labor or money, under the direction of the court, is interested in that fund and property. A party found by the court to be entitled to a share of the trust fund is interested in it. The bank, which loaned its money to the receiver with the approval of the court, and in that way added to the fund, is as much interested in the property or fund as the one from whom it was transferred to the receiver. Parties who contributed to the fund, as the bank did, after the bond was given could

---

Bank v. Varner.

---

not be definitely named in it, and, contemplating that others might become interested in the fund, the bond was made to run to certain parties and their assigns and all others interested or having an interest in the property of the estate. The bank is entitled to avail itself of the bond and to maintain the action to enforce the liability which has arisen upon it.

It is further contended that the failure of the receiver to pay the money as the court ordered is not a breach of the bond. The bond recites:

"Now, if the said S. C. Varner shall well and truly perform the said trust imposed, and make due report of his said trust to the court, as ordered by it, and make true account of all moneys and property which shall come into his hands by reason of said appointment, then this obligation shall be null and void. Otherwise to remain in full force and effect."

When the receiver failed to pay over the money as the court directed he failed to perform his trust as the bond required, and a liability upon the bond arose. He was an officer of the court, and undertook to care for and manage the trust as the court should direct, and when he failed to comply with its orders in closing up the trust there was a breach of the bond, for which he and his surety were liable.

It is said that the judgment of the court as to the distribution of the fund is not conclusive against the surety. It is not necessary to inquire whether the surety is concluded by that judgment. It was at least competent evidence in the action against the surety to show the default of the receiver and the breach of the bond. (*Commonwealth v. Gould*, 118 Mass. 300; Beach, Receiv. [Ald. ed.] § 201.) In this action the surety was a party and had the opportunity to contest the question, and the court, presumably on sufficient testimony, has found and adjudged that there was a breach of the bond and that the principal and surety were liable on it for specific amounts.

It is contended further that the claim of the receiver



for compensation is entitled to priority over that of the bank for the money loaned by it. The amount of compensation to be awarded by the receiver and the manner of payment are largely discretionary with the court under whose authority he acts. The statute relating to receivers makes no specific provision as to these matters. Attention is called to section 542 of the code of 1909, which authorizes a judge to make allowance for the compensation of receivers and others in proceedings in aid of execution and to tax the same as costs. The statute which treats generally of receivers, regulating their appointment and the disposition of property and funds which come into their hands, makes no such provision. The section referred to, therefore, has no application in cases like this one. In the absence of statutory regulation the compensation of a receiver, including the time of payment and the source from which it shall be derived, is a matter within the discretion of the court whose officer he is. The court, having its eye directly upon the receiver, and knowing as it did whether he was faithful and efficient in the performance of his duties, is in a better position to determine questions relating to compensation than is an appellate court. In most cases courts will give the claims of receivers for compensation and disbursements preference over those of other claimants, and will authorize the payment of the same out of the funds on hand, but the court in this instance determined otherwise. The nature of the services rendered and the promptness and integrity of the receiver in rendering them—his disposition to observe and comply with the orders of the court under which he was acting—may have affected the discretion and judgment of the court, and in view of all the circumstances we can not say that the discretion was abused.

The item of costs collected by the receiver belonged to the estate which he was managing. He is responsible for that money, and the surety is liable for his default

in accounting for it or in failing to pay it over in accordance with the order of the court.

There is nothing material in the objections made by Varner, and we see no reason to disturb the judgment of the trial court against either party. It is therefore affirmed.

---

G. A. SMITH, *Appellee*, v. THE REPUBLIC COUNTY  
MUTUAL FIRE INSURANCE COMPANY, *Appellant*.

No. 16,572.

SYLLABUS BY THE COURT.

1. **MUTUAL INSURANCE—Fire, Lightning and Tornado—Assessment on Premium Notes.** Under the act relating to the organization and control of mutual fire, lightning and tornado insurance companies (Gen. Stat. 1909, art. 5, ch. 55) the liability of a member to assessment on his premium note extends to the following purposes, and no other: First, to maintain a reserve fund equal to ten per cent of all the premium notes in force (Gen. Stat. 1909, § 4227); second, to pay losses which may accrue, and defray expenses (Gen. Stat. 1909, § 4216).
2. ——— **Illegal Assessment.** An assessment of premium notes not necessary to maintain the reserve fund at ten per cent of the premium notes in force and not necessary to pay losses or expenses, but levied merely for purposes to be developed in the future, is illegal.
8. ——— **Same.** A company with \$4,000,000 at risk held notes to the amount of \$85,463. It held mortgage loans to the amount of \$20,455, \$8546 of which constituted its reserve fund. It had cash on hand in the sum of \$4011. Its liabilities were slightly in excess of \$600. *Held*, an assessment of the premium notes under those conditions was illegal.
4. ——— **Guaranty Fund—Assessments.** Section 2 of chapter 273 of the Laws of 1905 (Gen. Stat. 1909, § 4241), authorizing mutual companies having certain qualifications to establish a guaranty fund and to increase the same from time to time, does not permit the assessment of premium notes directly for such purposes.

5. ——— *Contract—By-laws—Signature.* The assignee of a policy holder who signed an application agreeing to accept his policy subject to the by-laws of the company, a copy of which application was attached to the policy when issued, can not be heard to say that the by-laws are not a part of the contract, although the copy of the by-laws attached to the policy was not signed in accordance with section 4226 of the General Statutes of 1909.

Appeal from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed June 11, 1910. Modified.

*Hugh Alexander*, and *S. H. Allen*, for the appellant.  
*Robert C. Postlethwaite*, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The plaintiff is the assignee of a policy issued by the defendant, a mutual fire, lightning and tornado insurance company organized under the laws of this state. Having suffered a loss, the plaintiff brought suit on the policy. The defense was that he had failed to pay an assessment on the premium note given by his assignor, and consequently that he had forfeited his right to indemnity. He replied that the assessment was illegal. The statute (Laws 1885, ch. 132, § 15; Gen. Stat. 1909, § 4221) authorized the company to adopt a by-law excluding members from the benefit of their insurance while in default in payment of any assessment legally made. The claimed forfeiture was under a by-law framed in the language of the statute.

The premium note which was assessed contained the following stipulation: "It is further expressly agreed that this note is liable only for the losses and expenses incurred by said company." This provision was inserted to comply with section 4216 of the General Statutes of 1909 (Laws 1885, ch. 132, § 9), which reads as follows:

"In companies organized under the provisions of this

---

Smith v. Insurance Co.

---

act, all notes taken by them in consideration of premiums on their policies shall be assessable and collectable, in part or in whole, for the purpose of paying any loss or losses which may accrue, or defray expenses as provided in the charter and by-laws of the company, and for no other purpose whatever."

The trial court found that the assessment was not made to pay losses incurred or expenses, but for purposes to be developed in the future, and that such was the fact is not disputed. This being true, the assessment violated the statute and violated the contract embodied in the premium note.

It is argued that the directors of the company were authorized on business principles to accumulate a surplus of ready funds to meet contingencies in the company's affairs. The legislature covered that subject by section 21 of chapter 132 of the Laws of 1885 (Gen. Stat. 1909, § 4227), which reads as follows:

"A reserve fund equal to ten per centum of all the premium notes in force shall be set apart and maintained out of the cash receipts of the company. And whenever the cash in the hands of the treasurer of any such company, not included in the reserve fund, is insufficient to pay any loss that may accrue, then such deficiency shall be taken from the reserve fund, but such reserve fund shall not be reduced below one-half until an assessment shall be made upon the premium notes held by the company, sufficient to fully reimburse the reserve fund. And any such diminution of the reserve fund shall be held to be a liability to be provided for by assessment on the premium notes. Such part of the reserve fund of the company as is not needed for immediate use of the company shall be invested as directed by the directors, in such securities as other insurance companies organized in this state are by law authorized to make investments in."

Without this legislative authority assessments to create a reserve fund would be illegal. The theory of organizations of this kind is mutual insurance at cost, and not the building up of a financial institution, with

accumulations of capital and income and profits. The money remains in the pockets of the members until needed for the purpose for which the company exists—the payment of losses. It is then called out by assessments, and any deviation from this plan violates the principle upon which the corporation is founded. In practice it is found desirable to have always on hand a fund with which to meet losses promptly, and so the legislature provided for a limited reserve. In the judgment of the legislature ten per cent of the amount of the premium notes in force was sufficient. This provision must be read, however, in connection with the positive prohibition upon assessments for any purpose whatever except to pay losses and expenses. When so read the liability of a member to assessment on his premium note extends to the following purposes, and no other: First, to maintain the ten per cent reserve fund unimpaired; second, to pay losses which may accrue and expenses. It is impossible to calculate with accuracy the precise sum an assessment will produce, and the percentage of the assessment may be high enough to insure the collection of the needed amount. If a surplus result it will not be illegal, if in making the calculation the purpose of the statute was adhered to. Beyond this the managers of the company have no discretion.

When the assessment in question was made the company had been in business many years, had over \$4,000,000 at risk, and held premium notes in force to the amount of \$85,463. It held mortgage loans to the amount of \$20,455, much more than double the statutory reserve. Besides this, it had cash in bank and in the treasurer's hands to the amount of \$4011, and other assets of the value of \$150. Altogether it had available for the payment of losses and expenses approximately the sum of \$16,000, almost enough for twenty per cent assessments, over and above the full reserve required by law. Its liabilities were but a trifle.

over \$600. Consequently the assessment can not be justified.

In 1905 the legislature extended the authority to create a reserve by authorizing mutual companies which have been in business not less than two years, which have at least \$1,000,000 at risk, and which have premium notes amounting to not less than \$25,000, to establish guaranty funds. The statute reads as follows:

"Any such insurance company may create such a guarantee fund by setting apart not more than fifty per cent of the excess of its funds over and above the ten per centum reserve required by law and the amount of all current liabilities for losses and expenses, and may increase such fund from time to time out of its revenue over and above such reserve and liabilities, and such fund shall be invested in mortgages on real estate worth at least double the amount loaned thereon, or in the bonds of any county, school district or incorporated city issued under the laws of this state at their market value, or in United States or state bonds at their market value. The guarantee fund of mutual companies shall be liable for the claims against the company only after all other resources have been exhausted." (Laws 1905, ch. 273, § 2; Gen. Stat. 1909, § 4241.)

This statute must, of course, be construed with those to which it is related. So considered, it appears that a guaranty fund may be created from initial cash payments, from surplus money resulting from lawful assessments to maintain the reserve and to pay losses and expenses, from interest on the invested reserve, and perhaps from some other sources, all contributing to produce an accumulation of funds in the treasury which, at a given time, may not be necessary to recruit the reserve or pay losses or expenses. But no authority is given to levy a direct guaranty fund assessment. If it had been the desire of the defendant company to create a guaranty fund, it might have used for the purpose as much as fifty per cent of the

large excess of funds it possessed above its ten per cent reserve and current liabilities. It had no right to make a special assessment for such purpose. But, if the power to do so had existed, the finding of fact is conclusive that the assessment in question was not levied to that end. In no event, therefore, can the company defend its course under the guaranty fund statute.

Counsel for the defendant say that the plan of insurance outlined above is narrow, crude and archaic. If so the court can not amend it. The legislature adopted the scheme and the legislature must liberalize, perfect and modernize it. Thus far the legislature has adhered quite steadfastly to the notion of pure mutual insurance. For twenty years the statute of 1885 remained altogether unchanged, and the guaranty fund act of 1905 departs but little from the original theory. Manifestly the court can not intervene and grant to ambitious insurance managers a discretion over the finances of their companies which the legislature persistently withholds.

Section 4226 of the General Statutes of 1909 (Laws 1885, ch. 132, § 20) contains the following provision:

"Every policy issued shall have attached thereto a printed copy of the note and application, also a printed copy of the by-laws and regulations of the company, which shall be signed by the president and secretary of the company and the insured, and shall become a part of the contract between the insurer and the insured."

The copy of the by-laws attached to the policy was signed by the president and secretary of the company, but the insured neglected to affix his signature. The by-laws contained the following provision:

"There shall not be more than three thousand dollars taken in one risk, and in no case to exceed two-thirds of the value of the building insured, including the insurance by other companies. In case of double insurance, this company will only pay its ratable proportion of two-thirds of the value of the property."

There was concurrent insurance on the property when it was destroyed, and such insurance had been paid before the present suit was instituted. The trial court held that the by-laws did not become a part of the contract because they were not signed as the law provides, and computed the amount of recovery accordingly. The application for insurance was duly signed, and it contained an agreement to accept the policy to be issued, subject to the by-laws of the company. A copy of the application showing the signature thereto accompanied the policy. Under these circumstances neither the original policy holder nor his assignee could keep the policy and avoid the by-laws.

The case of *Insurance Co. v. Bank of Blue Mound*, 48 Kan. 393, is cited in support of the trial court's action. The opinion rendered in that case is not entirely persuasive, but the soundness of the decision need not be determined, since it does not appear that a signed application agreeing to be bound by the by-laws was taken and that a copy of such application was attached to the policy.

Other claims of error are unsubstantial. The judgment will be modified by computing the indemnity according to the by-laws. As modified, the judgment is affirmed. The costs are divided.



**GEORGE RAY, Appellee, v. THE KANSAS CITY-WESTERN RAILWAY COMPANY, Appellant.**

No. 16,578.

## SYLLABUS BY THE COURT.

**PERSONAL INJURIES—*Employee at Work upon a Railway Track—Duty to Keep Lookout.*** In an action for personal injuries received by one of the crew of an electric car which had been derailed, while he was picking up the tools that had been used in replacing it, by being struck by another car, *held*, that the evidence justified a recovery on the theory that the plaintiff was injured while engaged in work requiring his presence upon the track under such circumstances that he was not under an absolute duty to keep an outlook, and that the motorman of the approaching car, in view of what he saw, could have anticipated that some one might be in a place of danger and ought to have stopped or sounded a warning.

Appeal from Leavenworth district court; **ELI NIRDLINGER**, judge *pro tem.* Opinion filed June 11, 1910. Affirmed.

*William Warner, O. H. Dean, W. D. McLeod, H. C. Timmonds, and H. M. Langworthy*, for the appellant.

*John T. O'Keefe*, for the appellee.

The opinion of the court was delivered by

**MASON, J.:** The Kansas City-Western Railway Company appeals from a judgment rendered against it in favor of George Ray on account of a personal injury received while in its employ. It maintains that the evidence had no tendency to show negligence on its part, but on the other hand conclusively established that the accident was occasioned by the plaintiff's own want of due care.

Two empty electric cars were being taken from Leavenworth to Kansas City. Ray was helping run the second car, upon which were tools for rerailing cars in case of accident, consisting of jacks, crowbars, and pieces of board. The first car jumped the track between sta-

---

Ray v. Railway Co.

---

tions. The two crews, by the aid of the tools referred to, placed it back upon the rails, and it was run a short distance ahead. The second car was then brought up, and it also was derailed at the same point. Under the direction of the roadmaster, who had been upon the other car, it was replaced, moved forward a distance of ten or twenty feet, and stopped long enough to allow the tools to be loaded into the rear vestibule. While Ray was picking up one of the pieces of board which had been used in the work and left lying on the track he was run into by a regular passenger car, and received the injury complained of.

The plaintiff claims that he was injured while in the performance of a duty requiring his presence upon the track; that therefore he was not under a positive requirement to keep a lookout for an approaching car, but that it was the company's business to protect him, either by stopping such a car or by warning him of its approach, and that the omission to do so was actionable negligence.

The defendant insists that at the time of the injury the work upon the track had ceased, and that the plaintiff voluntarily and carelessly stepped upon the track in front of the approaching car when it was so near that no effort of any other employee could have saved him, and therefore that his injury was the result of his own negligence.

An employee had been sent back about seventy feet to flag the third car, the motorman of which testified that while about 250 feet away he saw the signal, and also the plaintiff standing beside the track near the second car; that he supposed he was flagged merely to prevent his running into the car; and that it did not occur to him that there was any other danger until Ray suddenly stepped upon the track ten or fifteen feet ahead of him, too late for the car to be stopped or for a bell or whistle to be sounded.

Although the testimony was conflicting we think

there was some evidence to support the view that the picking up of the board was a part of the operation of collecting the tools and clearing the track; that the plaintiff was consequently injured while performing a duty which required him to be upon the track, and was therefore relieved from the absolute duty of keeping a lookout, being required only to exercise reasonable care in view of all the circumstances; that the motorman, on seeing the car standing still ahead of him, with the plaintiff near it, should have inferred that the flagman's signal was intended in part at least for the protection of any of its crew who might be at work about it, and that by failing to stop or sound a warning he negligently caused the accident.

Complaint is made in detail regarding the charge to the jury. Some of the instructions given lacked accuracy of expression, and some of those refused might well have been given, but upon the whole the respective duties of the parties were fairly defined, and it does not appear that any substantial injustice was done to the defendant. In the appellant's brief it is said:

"The motorman had no notice or knowledge that any duty would require the plaintiff to be working at that point, and he (the plaintiff) must, from the nature of the work he was doing, have known this and assumed the risk accordingly. Such being the case, the motorman had the right to assume that the plaintiff would observe reasonable precaution for his own safety and avoid the on-coming car, and the failure to sound a warning was not negligence."

The motorman knew that the car ahead of him had stopped at an unusual place, for some purpose that was not apparent. The jury were justified in regarding this as notice to him that its crew might be upon the track near it, engaged in work requiring their whole attention and preventing their keeping constantly on guard against another car. The instructions with regard to speed, outlook and warning must be considered in the light of this situation, which distinguishes this case

from those in which trackmen have been injured through their failure to watch for a train the approach of which was to have been expected.

The petition alleges negligence of the defendant in failing to post a flagman. The evidence as a whole showed quite clearly that one was sent out; yet, as there was some slight testimony to the contrary, it was not error to submit the question to the jury. The precise issue in this regard presented by the pleadings was somewhat broadened in the instructions, but not sufficiently so to constitute error.

Cross-examination of the plaintiff upon a matter affecting his credibility was restricted, but went far enough to advise the jury of the substantial facts involved.

The jury found specially that the plaintiff could have seen the car if he had looked, and that the motorman could not have stopped it after seeing him upon the track in time to avoid the accident. But the general verdict implies findings that the plaintiff's situation was such that he was under no absolute duty to keep a lookout, that he used diligence adapted to the situation, and that the motorman should have anticipated that he might get upon the track.

The judgment is affirmed.

---

Mosier v. Butler County.

---

DANIEL MOSIER, *Appellant*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BUTLER, *Appellee*.

No. 16,577.

SYLLABUS BY THE COURT.

**NOTICE—*Defective Bridge—Chairman of County Board—Injury to a Traveler.*** The plaintiff brought an action against a county to recover for injuries occasioned by a defective bridge. *Held*, that the evidence showing knowledge of the chairman of the board of county commissioners of the defective condition of the bridge was sufficient as against a demurrer.

Appeal from Butler district court; GRANVILLE P. AIKMAN, judge. Opinion filed June 11, 1910. Reversed.

*George J. Benson*, and *T. A. Kramer*, for the appellant.

*K. M. Geddes*, county attorney, and *C. A. Leland*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff sued to recover for injuries caused by a defective bridge. The court sustained a demurrer to his evidence, and this is the error complained of.

It was a county bridge, and consisted of two steel spans across the Whitewater river, with a thirty-foot approach on the east which was built entirely of wood, with guard rails on either side. The plaintiff, accompanied by his two daughters, was driving over the bridge in a buggy drawn by one horse. It was in the evening, after dark; they had crossed the bridge proper, and were on the approach, when the horse took fright at a pile of stone at the side of the highway and backed some distance against one of the guard rails. The railing was defective; it gave way, with

---

Mosier v. Butler County.

---

the result that the vehicle, with its occupants, was thrown to the ground, a distance of about twenty feet, and the plaintiff received injuries.

The defendant seeks to sustain the court's ruling upon the ground that the approach where the accident occurred was no part of the bridge. There is nothing substantial in this. Obviously the wooden approach was as much a part of the bridge as the steel structure. It appears from the evidence that if there had been no approach the bridge would have stood at this point twenty feet above the ground, so that, without the approach, the bridge would have been useless.

There is a further contention that the defective condition of the bridge was not the proximate cause of the injury, for the reason that the horse was frightened at the pile of stone in the highway. In support of this the defendant relies upon the well-known principle that if two distinct causes are successive and unrelated in their operation one of them must be the proximate and the other the remote cause. But the principle has no application here, because it is obvious that the two causes were related in their operation. Notwithstanding the frightening of the horse, the injury would not have resulted if the guard rail had not been defective. One reason why guard rails were necessary was the liability that horses might be frightened while on this part of the bridge, resulting in just such accidents.

The principal contention is that the plaintiff failed to prove notice to the chairman of the board of county commissioners of the defect in the bridge. The statute requires that before the county can be held liable in cases of this character the chairman of the board of county commissioners must have had notice of the defects at least five days prior to the time the injury was sustained. (Laws 1887, ch. 237, § 1; Gen. Stat. 1909, § 658.) This seems to be the ground upon which the court sustained the demurrer. The plaintiff's testi-

mony, however, showed that the guard rails on the bridge had been in a defective condition for several months, and that about three weeks before the accident the county commissioners went to the bridge for the purpose of examining it, with a view of ordering some parts of it repaired, and that shortly afterward repairs were commenced on the abutments supporting the main structure of the bridge. A witness who was present at the time testified that he saw the three commissioners examine the guard rails; that he heard Mr. Anderson, the chairman, make the remark that they were in bad repair; and that some of the commissioners took hold of the guard rails and examined them as they went along. Mr. Anderson, the chairman, testified that while examining the bridge he noticed the guard rails on the south side along their entire length, and noticed that they were a little shaky, but did not pay much attention to them; that after driving across the bridge once they walked back and examined it again. He was then asked this question: "Now, from what you observed from the banisters there, and from shaking them, did you think they were substantial and safe?" He answered: "Well, no, sir; they were not."

It is not necessary for the plaintiff to show that the chairman had knowledge of the defective condition of the railing at the exact spot where it gave way. If he had knowledge of the condition of the guard rails, and that they were unsafe, as he testified, he had notice within the meaning of the statute. While it has been held that the notice required is actual and not constructive (*Erie Township v. Beamer*, 71 Kan. 182), it has also been held that actual knowledge of the defect is the same as actual notice (*Madison Township v. Scott*, 9 Kan. App. 871). In this case there was ample evidence to support a finding that the chairman had actual notice that the guard rails were defective, and it was certainly sufficient as against a demurrer.

---

Lake v. Hargis.

---

The demurrer to the evidence should have been overruled, and the judgment is reversed and the cause remanded for another trial.

---

RILEY LAKE, *Appellee*, v. A. J. HARGIS, *Appellant*.

No. 16,578.

SYLLABUS BY THE COURT.

**DAMAGES—Action on Replevin Bond—Loss of Time—Attorney's Fees—Expenses.** In a replevin action before a justice of the peace the plaintiff gave the ordinary bond at the commencement of the action. The defendant gave a redelivery bond, and retained possession of the property replevined. Upon the trial the defendant was adjudged to be the owner and entitled to the possession of the property. No appeal was taken. The judgment became final, and the plaintiff paid the costs. Afterward the defendant commenced an action for damages, upon the bond given by the plaintiff, in which he claimed damages for loss of time, attorney's fees and expenses incurred in making his defense. *Held*, that in the absence of malice, want of probable cause or bad faith on the part of the plaintiff, damages of this nature can not be recovered upon the replevin bond.

Appeal from Barber district court; PRESTON B. GILLET, judge. Opinion filed June 11, 1910. Reversed.

*G. M. Martin*, for the appellant.

*Seward I. Field*, for the appellee.

The opinion of the court was delivered by

GRAVES, J.: This is an action upon an ordinary replevin bond, given at the commencement of an action of replevin before a justice of the peace. Riley Lake had in his possession a hog which A. J. Hargis claimed to own. Lake refused to surrender the hog and Hargis commenced an action of replevin before a justice of the peace to recover possession of it. Lake gave a redeliv-



---

Lake v. Hargis.

---

ery bond and retained possession of the animal. The trial was had before a jury and the verdict was in favor of Lake, who was adjudged to be the owner and entitled to the possession of the hog. No appeal was taken and the judgment became final. Hargis paid the costs.

Afterward Lake commenced this action upon the bond given by Hargis at the commencement of the replevin action, to recover damages for loss of time, attorney's fees and expenses incurred in and about that action. The petition recited the facts concerning the commencement of the replevin action, including the bond given by Hargis. The bond reads:

"REPLEVIN BOND.

"STATE OF KANSAS, BARBER COUNTY, SS.

"WHEREAS, A. J. Hargis has this 8th day of June, 1908, commenced an action against Riley Lake before the undersigned justice of the peace of Lake City township, in said county, for the recovery of divers goods and chattels, all of the aggregate value of twelve dollars; now, we, the undersigned residents of said county, bind ourselves to the defendant in the sum of twenty-four dollars that said plaintiff shall duly prosecute the above-entitled action and pay all costs and damages that may be awarded against him, and if a return of the property therein delivered to him be adjudged that he will deliver the same to said defendant.

H. S. MILLER.

DAVE FREEMYER.

"Approved by me this 8th day of June, 1908.

S. G. STEWART, J. P."

Upon these facts the plaintiff's statement of damages in the petition is as follows:

"This plaintiff states that he has been damaged by said defendant by reason of said action in the loss of time in attending upon said case, and in expenses of himself and attorney and attorney's fees in the sum of \$75.

"Wherefore he prays judgment against the defendant in the sum of \$125, and for costs of this action."

To this petition a demurrer was filed by the defendant, upon the ground that it did not state facts suffi-

---

Lake v. Hargis.

---

cient to constitute a cause of action. The demurrer was overruled. The defendant then filed an answer consisting of (1) a general denial, and (2) an admission that he commenced the action of replevin before the justice of the peace and gave the bond as alleged in the petition. He further alleged in substance that the action was commenced in good faith and after a full and fair consultation with an attorney, who advised the action; that he conscientiously believed he was the owner of the hog and entitled to its immediate possession; and that after his defeat in court he fully paid the judgment entered upon the verdict.

To this answer the plaintiff filed a demurrer, on the ground that it did not state any defense to the petition. The demurrer was sustained, except as to the general denial. The case proceeded to trial to the court, without a jury. It was agreed that the amount of damages claimed by the plaintiff was reasonable if he was entitled to recover anything. Thereafter the court filed conclusions of fact and law. After reciting the facts as above stated, the court announced the following conclusions of law:

"The court finds as a matter of law that a bond in replevin, such as the one sued on in this action, contemplates a liability of principal and surety thereon for the attorney's fees in defending a replevin action, such as the case prosecuted before the justice of the peace, as herein found, together with the expenses and loss of time in such defense, and that in this case the plaintiff, Riley Lake, is entitled to recover the sum of \$125 as his attorney fees, expenses and loss of time in defending said replevin suit before said justice of the peace.

"To all of which findings of fact and conclusions of law the defendant, A. J. Hargis, excepted and excepts.

"It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant, A. J. Hargis, the sum of \$125, and that said judgment bear interest at the rate of six per cent per annum from this date, and that the plain-

---

Lake v. Hargis.

---

tiff also recover the costs of this action, taxed at \$31.60. In accordance herewith let execution issue."

This was erroneous. A replevin bond given at the commencement of the action states the conditions under which it is given and the measure of the indemnity which the defendant may receive thereunder. One of the stipulations in the bond, and the one upon which the plaintiff in this action relies, reads: "And pay all costs and damages that may be awarded against him." No liability could accrue upon this clause of the bond until a breach thereof occurred. None is alleged. It is not claimed that any judgment for costs or damages was awarded against Hargis which he failed to pay. On the contrary it is conceded that he paid the judgment in full. The word "damages," as used in this bond, refers to damages which may be occasioned to the defendant by the detention of the property replevined and its loss if not returned when a return is adjudged. It does not embrace damages of a general nature, such as may be recovered in an action brought upon a bond given to obtain a writ of attachment or injunction under sections 192 and 242 of the civil code. (Gen. Stat. 1901, §§ 4626, 4689; Code 1909, §§ 192, 254.) In such cases the bond provides for and secures "all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained." (Civ. Code, § 192.) A replevin bond is not intended to give such indemnity, but replevin in this respect is like any other civil action; and where it is commenced in good faith, and without malice or want of probable cause, payment of the judgment will extinguish further liability. (*Deere v. Spatz*, 78 Kan. 786; *Myers v. Shertzer*, ante, p. 275, 278; *Cobbey*, Law of Repl. §§ 925, 975, 976; *Bank v. Morse*, 60 Kan. 526; *Winstead, Sheriff, v. Hulme*, 32 Kan. 568.)

In an action on a bond no recovery can be had for a sum greater than the bond was given to secure; in this

case, \$24. (34 Cyc. 1582; 24 A. & E. Encycl. of L. 534.)

The case was tried upon a wrong theory. It seems to have been assumed that an action on a bond in replevin is controlled by the same rule as that which obtains in actions upon bonds in attachment and for injunction where the writ has been wrongfully obtained. We do not concur in this view. This theory of the case, which we think erroneous, naturally led the court to a wrong view of the action generally, and an erroneous judgment naturally followed.

The judgment is reversed.

---

MARY J. BAKER, *Appellant*, v. MARY KELLEY LANE  
*et al.*, *Appellees*.

No. 16,579.

SYLLABUS BY THE COURT.

1. TAX DEED—*Grantee Dead When Deed Was Executed*—*Action by Heir of Grantee to Quiet Title and Enjoin Defendants in Possession*. A party whose only title to land is under a tax deed made to a grantee who was dead when it was executed, which was delivered to such party as the heir of the deceased person, who caused the deed to be recorded and paid the taxes on the land, but who never took actual possession, can not maintain an action to quiet title or for an injunction against one who holds under the government title and who is in actual possession of the land.
2. WORDS AND PHRASES—*"His Heirs and Assigns"*—*Void Tax Deed*. The words "his heirs and assigns," following the name of the deceased person so designated as grantee in the deed, did not operate to vest title in such heir, and the deed is void as a conveyance.
3. REFORMATION OF INSTRUMENTS—*Tax Deed*—*Substitution of Plaintiff as Grantee*—*Application for a Second Deed*. A person who, as heir of the deceased owner of a tax-sale certificate, took out a tax deed thereon, wherein the name of the deceased person was inserted as grantee, can not maintain an

---

Baker v. Lane.

---

equitable action to have the deed reformed by a decree substituting her own name as grantee therein. She might, upon due application to the county clerk, have obtained a deed made to herself as grantee; notwithstanding the issuance of the former instrument.

Appeal from Seward district court; WILLIAM H. THOMPSON, judge. Opinion filed June 11, 1910. Affirmed.

*A. L. Billings*, for the appellant.

*Thomas A. Scates*, and *Albert Watkins*, for the appellees.

The opinion of the court was delivered by

BENSON, J.: This is an action to reform a tax deed, to quiet title under it, and for an injunction to restrain the defendants from entering or trespassing upon the land or injuring it. A demurrer to the petition was sustained, and the plaintiff appeals.

The petition shows that defendant Mary Kelley Lane is the owner in fee simple of the land in question, unless her title has been divested by a tax deed under which the plaintiff, Mary H. Baker, claims to own it.

The title to this land became vested in Mary Kelley Lane in the year 1888. It was then vacant and unoccupied, and so remained until April 10, 1908, when possession was taken by the defendants, who still hold it. The taxes of 1889 due upon this land were delinquent, and it was sold at the tax sale of 1890 and a certificate was issued thereon, which was afterward assigned to J. W. Baker, the plaintiff's husband at that time, but who died on April 3, 1892. On March 7, 1894, the plaintiff, now the sole surviving heir of the decedent, presented the tax certificate to the county clerk and requested that a tax deed be made to J. W. Baker, which was accordingly done, and the deed was delivered to her. This tax deed purports to convey the land to "J. H.

---

Baker v. Lane.

---

Baker, his heirs and assigns," but the initial "H" was inserted by a clerical error, instead of the initial "W," as directed. It is dated March 7, 1894, and was recorded that day. On the same date the plaintiff redeemed the land from a tax sale made in 1891, and paid all taxes to and including the taxes of 1893.

In April, 1908, finding that the defendants, Mary Kelley Lane and H. W. Lane, her husband, had entered upon the land, erected a small house, and broken out about five acres, the plaintiff caused a notice to be given to them that they were considered as trespassers, and that an action to quiet title and for an injunction would be commenced against them. Before this notice was given the defendants had offered to pay the tax lien, which was refused.

The petition is very voluminous. Exhibits are attached containing correspondence of the defendants with the county clerk and the county treasurer, and between the parties. It contains an allegation that the plaintiff took possession under the tax deed upon its delivery, but as it is also alleged that the land was vacant and unoccupied until the defendants' entry, and as this fact is also stated in the exhibits, it is understood that the possession referred to in the petition is constructive only; and this is the claim as stated in the plaintiff's brief. The entry of the defendants is characterized as wrongful and a trespass, made to harass, annoy and extort money, but these and other like charges add nothing to the legal effect of the facts pleaded, the substance of which is given above. The case presented, then, is that of one party in possession of land claiming title thereto in fee simple, and another party out of possession asserting a superior title and right of possession under a tax deed.

The plaintiff contends as a matter of law that the tax deed to Baker and his heirs and assigns vested the title in Baker's heirs, and cites *Rynearson v. Conn*, 77 Kan.

160. The cases are easily distinguishable. There the deed was to "the heirs of D. C. Rynearson, deceased"—a designation sufficiently definite to pass the title to whoever were in fact such heirs. Here the deed was to "J. H. Baker, his heirs and assigns." The words "heirs and assigns" are found in the statutory form of a tax deed; and the word "heirs" is usual in other conveyances, although not necessary under our statute, and implies a title in fee simple in the grantee named, which may descend to his heirs. A deed to a person not living and his heirs is void, there being no person to take under it. (1 Jones, Law Real Prop. Convey. § 223; 3 Wash. Real Prop., 6th ed., § 2121; 1 Dev. Deeds, 2d ed., § 123; *Hunter v. Watson*, 12 Cal. 368; *Miller v. Chittenden et al.*, 2 Iowa, 315; *Neal v. Nelson*, 117 N. C. 393.) The argument is made that the words "J. H. Baker, his heirs and assigns," are equivalent to "J. H. Baker's heirs," but this construction is unwarranted, as it omits the grantee expressly named.

The plaintiff, having failed to prove title in herself, can not maintain her action to quiet title or for an injunction against the defendants, who were in actual possession when the suit was begun. Other objections urged against granting that relief need not be discussed.

The cause of action to reform the tax deed can not be maintained. A party desiring to obtain affirmative relief in court, based upon tax proceedings, should pursue such proceedings before the proper officers to a conclusion, which will give at least a *prima facie* right to the relief sought. The holder of the tax certificate had a right to a tax deed made to the proper grantee, and a proper deed could have been obtained by application to the county clerk, notwithstanding the previous execution of a void or imperfect one. (*Chippinger v. Tuller*, 10 Kan. 377; *Young v. Gibson*, 80 Kan. 264; *Douglass v. Nuzum*, 16 Kan. 515; see, also, *A. T. & S. F. Rld. Co.*

---

Baker v. Lane.

---

*v. Comm'rs of Jefferson Co.*, 12 Kan. 127.) No good reason is shown why the court should exercise its chancery powers to accomplish for the plaintiff what might have been obtained long ago by an application to the county clerk. Whether the period in which the right to obtain such a deed or to enforce rights under it has elapsed is not decided, as the record does not present that question and it has not been discussed.

The plaintiff by this equitable action seeks to accomplish the substantial purpose of an action in ejectment. The petition and exhibits show that the defendants are in possession of the land, and if they should be restrained, as the plaintiff prays, they would, to that extent at least, be ousted from the possession which they have taken peaceably, under a title which is perfect unless overthrown by the tax deed. In this situation, even if the deed were reformed or had been made in the first instance to the proper grantee, an action to recover possession would have been the appropriate proceeding. (*Atkinson v. Crowe*, 80 Kan. 161.)

In the assignment of the tax certificate to J. W. Baker the initial "H" was by mistake inserted instead of "W," and following this mistake the county clerk used the same initial in writing the name of the grantee in the tax deed; but this is unimportant, and is so treated in the briefs, as it appears that it was intended to make both the assignment and the deed to J. W. Baker, and both should be considered as so written.

The judgment is affirmed.



A. MATHENEY, *Appellee*, v. THE CITY OF EL DORADO,  
*Appellant*.

No. 16,580.

## SYLLABUS BY THE COURT.

1. ACCORD AND SATISFACTION—*Requisites*. To constitute an accord and satisfaction, the agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must have been entered into by the parties understandingly and with unity of purpose.
2. ——— *Proof—Authority of Person Accepting Tender*. A contractor undertook to build a bridge for a city and arranged with a banker to furnish the money necessary to carry on the work, and he gave the banker a writing to the effect that all warrants for the construction of the bridge should be issued to and cashed by the banker. A dispute arose between the city and the contractor as to the amount due for certain extra work done on the bridge. Later an allowance was made by the city in full payment of the work, which the contractor refused to accept. He then informed the banker that the allowance must not be accepted. A warrant was drawn by the city for the allowance and placed in the bank, where the funds of the city were kept, in the custody of the son of the banker, who was deputy city treasurer. Some time afterward the banker, without other authority than the writing mentioned, drew the money on the warrant, but neither the contractor nor the mayor and council of the city had any knowledge that the warrant had been cashed until long after this action to recover the amount of the claim had been brought. *Held*, that the banker had no authority to make settlements for the contractor, and that the drawing of the money on the warrant did not operate as an accord and satisfaction of the original claim nor preclude the contractor from recovering the entire debt.
3. MUNICIPAL CORPORATIONS—*Authority of Agent—Ratification—Estoppel*. The city having appointed a superintendent to supervise the building of the bridge, and having accepted the work done under his supervision, as well as the bridge, is not in a position to deny liability for the work done under the direction of the superintendent because of irregularity in the appointment of the superintendent. (*City of Ellsworth v. Rossiter*, 46 Kan. 237.)
4. JURY AND JURORS—*Special Findings—Definiteness*. A party is entitled to have a jury make special findings of the ulti-

---

Matheney v. El Dorado.

---

mate facts of the case, but has no right to ask for mere evidentiary matters nor that the jury shall file a bill of particulars as to each fact.

Appeal from Butler district court; GRANVILLE P. AIKMAN, judge. Opinion filed June 11, 1910. Affirmed.

*K. M. Geddes*, and *T. A. Kramer*, for the appellant.

*E. N. Smith*, *V. P. Mooney*, and *E. D. Stratford*, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by A. Matheney to recover from the city of El Dorado for extra material and labor furnished in connection with the building of a bridge for the city in pursuance of a contract. On October 21, 1907, the city of El Dorado, by its mayor and council, made a contract with A. Matheney by which the city agreed to pay \$3350 for the construction of a stone arch bridge in the city according to certain specifications. It provided that the sum mentioned should be paid for the "bridge proper," and that "all other work required by the council to be done shall be considered extra and shall be paid for at the following prices," specifying particular rates per cubic yard or foot for excavation and masonry. The material used and the manner of construction were "to be subject to the inspection and acceptance or rejection of the superintendent appointed by the mayor and council," and from time to time during the progress of the work the superintendent, as well as the mayor and council, ordered extra work to be done in connection with the building of the bridge. Matheney borrowed the money with which to furnish the material from J. E. Dunn, the president of a local bank, and to protect Dunn he gave the following instruction to the mayor:

"You are hereby authorized, instructed and directed to draw any and all warrants issued to me for work on

---

Matheney v. El Dorado.

---

Central Avenue bridge in favor of J. E. Dunn. He is hereby authorized to receipt for, and cash, the same."

In accordance with the terms of the contract \$3350 was paid by the city for the construction of the bridge proper. Much extra work was done, and Matheney filed with the city clerk claims amounting to \$2713.50 for extra work and material, which included excavating, stone work, ornamental plates, a cement walk on the bridge, extra support for abutments, etc. The council questioned the amount of the bill, and after canvassing it for some time authorized the payment of \$1982.93 in full settlement of the account. A warrant for this amount was delivered to Dunn, who, after holding it for some time, obtained the money on it. It was never accepted by Matheney as full settlement of the account, and he contends that Dunn did not so accept it, and, further, that he had no authority to do so. In this action to recover on his claim the jury found in favor of Matheney and awarded a verdict for \$546.53, being the difference between the amount of the warrant and the amount due for the extra work and material.

The petition of Matheney, although challenged for uncertainty, appears to be sufficiently definite to advise the city of the nature of his claim and to meet the requirements in pleading.

The principal contention in the case is that under the pleadings and the evidence there was what amounted to an accord and satisfaction—a compromise and settlement of the controversy which precludes appellee from maintaining his action or recovering an additional amount. The city insists that when it made an allowance of \$1982.93 as full payment of the extra work on the bridge and issued a warrant for that sum, which was cashed by Dunn, the original demand of Matheney was thereby satisfied and extinguished.

To operate as a satisfaction and discharge in cases of this kind the smaller sum must not only have been offered, but it must have been accepted with the under-

---

Matheney v. El Dorado.

---

standing that it was in full satisfaction of the larger amount claimed. Was there a substitution of a later executed agreement for the earlier one? To make the later agreement effective it was necessary that the minds of the parties should meet, and that it should have all the essential elements of an ordinary contract. In *Harrison v. Henderson*, 67 Kan. 194, it was said:

“An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor.” (Page 200.)

(See, also, 1 Cyc. 331.)

There is no accord as to a settlement unless the parties act understandingly and each has complete knowledge of the essential facts involved. There does not appear to have been an accord between the city and Matheney as to the discharge of the indebtedness for extra work and material. Matheney never consented to accept the money in discharge of his claim, and never authorized Dunn to make such an acceptance. When Matheney was informed by the council that it had only allowed a part of his claim he declined to accept the allowance and informed Dunn to that effect. The funds of the city appear to have been kept in Dunn's bank, and his son was deputy city treasurer. When the warrant was issued, on June 25, 1908, it was turned over to the son, who was acting for both the city and the bank. Dunn did not draw the money on the warrant until July 18, 1908, and he did so then without the knowledge of Matheney and after he had been told that it would not be accepted. Matheney did not learn that Dunn had drawn the money on the warrant until the holidays, several months after this action was begun. The mayor and council, it appears, were not aware that Dunn had obtained the money on the warrant until long after it

---

Matheney v. El Dorado.

---

was cashed, for as late as November 12, 1908, they made Matheney an offer of \$2200 on his claim. Aside from the direction of Matheney not to accept the allowance, Dunn had no authority to make compromises for Matheney. The only authority conferred on him was in the writing already quoted. It may be doubted if that writing related to warrants for extras or for more than those issued for the bridge proper, but, assuming that it did, he was certainly not vested with authority to make settlements between the city and Matheney. Apparently the sole purpose of the writing was to protect Dunn for the advancements made to Matheney during the progress of the work. It gave him no right to adjust disputes as to what was due on the contract, nor any authority except to receive warrants after disputes were adjusted and settlements made between the two contracting parties. Power to make settlements of that character by the acceptance of warrants or otherwise could not be exercised unless it was expressly conferred. The writing did not purport to make Dunn the agent of Matheney to settle controversies with the city, and there was nothing in the subsequent conduct of Matheney which precluded him from insisting on full payment of the entire debt.

Error is assigned on the admission of testimony to the effect that certain work was done by Matheney under the direction of a superintendent appointed by the mayor and council to superintend the building of the bridge. The contract between the parties contemplated the appointment of a superintendent by the city, and provided that Matheney should furnish material and perform work subject to the inspection and acceptance of the superintendent. It is a little late for the city to question its own authority for the appointment of a superintendent to oversee the building of the bridge. The mayor and council did appoint a superintendent, and he did direct the work, with the knowledge and approval of the city authorities. The city adopted the action of the superintendent, and, more than that, the

---

Matheney v. El Dorado.

---

materials furnished and the work done by Matheney have been accepted by the city and its officers. It is therefore bound to pay for such material and work at the rates specified in the contract, and this notwithstanding the superintendent may have been irregularly appointed. (*City of Ellsworth v. Rossiter*, 46 Kan. 237; *Mound City v. Snoddy*, 53 Kan. 126; *Roberts v. St. Marys*, 78 Kan. 707.)

There are other objections to testimony, and there is some criticism of the instructions, but nothing substantial is found in any of them; and the evidence in the case appears to be sufficient to support the verdict by the jury.

Complaint is made that the jury were not required to answer more fully one of the special questions submitted. The question was, "Did he [Matheney] object to or disavow the action of said J. E. Dunn, and, if so, in what manner? State fully." The answer was, "Yes." Appellant insists that the jury should have been compelled to state at length what the disavowal was. There was no error in the refusal. In effect appellant asked for a recital of the evidence. A party is entitled to special findings as to ultimate facts, but has no right to ask for mere evidentiary matters nor to require the jury to file a bill of particulars on each fact.

It is finally contended that the court should in any event have divided the costs. This is based on an offer which was made to confess judgment after the action was begun. The offer was for \$2200, and was manifestly made on the theory that the warrant had not been cashed and that no part of the claim for extras had been paid. The amount awarded by the jury was \$546.53, and this, with the warrant previously cashed, amounted to \$2529.46. As this sum was considerably more than the amount of the offer there was no reason for dividing the costs.

We find no error in the record, and therefore the judgment is affirmed.

---

Puckett v. Hetzer.

---

F. C. PUCKETT, *Appellee*, v. A. R. HETZER, *Appellant*,  
and JACOB BAEHLER *et al.*, *Appellees*.

No. 16,582.

SYLLABUS BY THE COURT.

NAMES—*Idem Sonans*—*Notice by Publication*—*Default Judgment*. A default judgment quieting title, based upon service made by publishing a notice which states the defendant's name as Joseph Remer, is valid against Joseph Renner.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed June 11, 1910. Affirmed.

H. O. Trinkle, for the appellant.

Arthur H. Shay, for the appellees.

The opinion of the court was delivered by

BURCH, J.: In April, 1903, F. C. Puckett took judgment by default quieting his title to the land in controversy. Service was obtained by publication. The proceedings, including the notice, gave the defendant's name as Joseph Remer. In July, 1908, A. R. Hetzer obtained a quitclaim deed of the land from Joseph Renner, and in August following moved to vacate the judgment as void so far as it affected the interest of his grantor. The motion was denied, and Hetzer appeals.

The notice only need be considered. If the proper party were duly served other mistakes are inconsequential. Where service by publication is undertaken the notice must state the name of the party to be served, and the question is whether the name Joseph Remer, appearing in a printed notice of that character, looks enough like, and when pronounced sounds enough like, Joseph Renner to stand for the same person. Perfect orthography is not required. Perfect identity of sound is not required. Grant that there is

some orthoëpical standard in existence, pronunciation modeled after it will vary in different localities, with different individuals in the same locality and with the same person at different times, and practical similarity is all that can be insisted upon.

The appellant founds his argument upon a book rule that "e" has its long sound when it ends an accented syllable. From this he concludes that the name in the notice must be pronounced Rē'-mer. The argument fails for these reasons: No law of syllabification is cited which prevents the letter "m" from forming a part of the first syllable of this proper name. If there be such a law the court is not bound to obey either it or the cited rule in determining the question propounded, and greater latitude is indulged in the pronunciation of proper names than in any other class of words. (*State Bank v. Kuhnle*, 50 Kan. 420.) This being true, the appellant is bound to take into account the pronunciation Rēm'-er.

The letters "m" and "n" are pronounced with continuous nasal tones, the only difference being in the way the oral passage is obstructed to force the air through the nose. There is much similarity in sound even when pronounced with care, and, leaving out of account all slovenliness, they are frequently confused because of differences in the shape and structure of the organs of speech in different persons, differences in the degree of perfection with which those organs are used, differences in stress and differences in rapidity of enunciation. The doubling of the letter "n" in Renner has no marked effect on the sound of the word, no more than the doubled "t" in ditty, as compared with city, in ordinary speech. In both Remer and Renner the voice glides from the common vowel "e" into the nasal tone without any break, and then passes smoothly to the same final "er," thus contributing much to identity. On the whole the difference is so slight and the



---

Hampe v. Sage.

---

resemblance so strong that a case of *idem sonans* in law is made out.

The appellant refers to the decision in *Entrekin v. Chambers*, 11 Kan. 368, wherein it was held that Brimford and Binford are not *idem sonans*. It is plain, however, that the buzzing "r" was the principal factor in destroying similarity of sound and not the substitution of "m" for "n." If the two words had been Bimford and Binford, the decision would doubtless have been different.

Besides what has been said in reference to sound, the appearance of the printed words "Joseph Remer" was enough like that of Joseph Renner to put a fairly prudent person on guard against a clerical or typographical error. Much mail has been opened without hesitation when the divergence from correct orthography was much greater.

The judgment of the district court is affirmed.

---

GEORGE HAMPE, *Appellee*, v. AARON SAGE, *Appellant*.

No. 16,583.

SYLLABUS BY THE COURT.

1. *CONTRACTS — Exchange of Lands — Writing Construed.* A writing that describes itself as a contract between two parties, each of whom agrees to sell a tract of land at a stated price, and that includes a computation showing the amount of a mortgage on each tract and the cash balance to be paid by one party to the other, is fairly to be interpreted as an agreement for the exchange of the tracts on the basis stated.
2. — *Statute of Frauds — Memorandum — Description of Land.* The statute of frauds renders demurrable a petition declaring upon a contract for the sale of land, evidenced by a memorandum which describes it only as situated in a certain county and containing a certain number of acres, there being no allegation that it was the only land in that county owned

---

Hampe v. Sage.

---

by the party undertaking to sell it. The pleading is not aided by an averment that such party had recently showed to the proposed buyer a tract of the size mentioned in the county referred to.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed June 11, 1910. Reversed.

*Edwin A. Austin*, and *C. E. Carroll*, for the appellant.  
*J. B. Larimer*, and *A. M. Harvey*, for the appellee.

The opinion of the court was delivered by

MASON, J.: George Hampe sued Aaron Sage for damages occasioned by his refusal to carry out a contract for the exchange of lands, and recovered a judgment, from which the defendant appeals. The question involved is whether the contract was evidenced by a sufficient writing to satisfy the requirement of the statute of frauds that "no action shall be brought whereby to charge . . . any person upon any . . . contract for the sale of lands, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing." (Laws 1905, ch. 266, § 1; Gen. Stat. 1909, § 3838.) The writing upon which the action was brought reads as follows:

"AUGUST 20, 1907.

"This is to certify, that on the above date, this contract made between Aaron Sage, party of the first part, and George Hampe, party of the second part. Party of the first part agrees to take twenty dollars per acre for (760) seven hundred and sixty acres located in Pottawatomie county, Oklahoma, which amounts to fifteen thousand two hundred (\$15,200) dollars. Party of the first part further agrees to take back a mortgage of six thousand dollars at five per cent per annum. Party of the second part agrees to take (\$160) one hundred and sixty dollars per acre for 81½ acres located in Shawnee county, Kansas, which amounts to thirteen

## Hampe v. Sage.

thousand and forty dollars (\$13,040). Said party of the second part further agrees to give said party of the first part a first mortgage of (\$6000) six thousand dollars, with interest at five per cent per annum, on said land located in Pottawatomie county, Oklahoma; these figures are thus in full:

Party of the first part.....	\$15,200
Party of the second part.....	13,040
Balance due Aaron Sage.....	\$2,160
First mortgage on Hampe land.....	2,500
	\$4,660
Interest on mortgage to January 1, 1908.....	112
	\$4,772
Amount of mortgage.....	\$6,000
Amount of mortgage and interest and difference.....	4,772
To be cash from Sage to Hampe.....	\$1,228

"Witness this 20th day of August, 1907.

AARON SAGE.

GEORGE HAMPE."

The defendant maintains that this instrument evidences merely an unaccepted offer by each party to sell land at a stated price, neither undertaking to buy. We think, however, so far as this feature of the matter is concerned, it amounts to a completed contract. It is so designated by its own terms. By it Hampe plainly agrees to buy, for he expressly undertakes to make a mortgage on the Oklahoma land. The detailed computation showing the price of the respective tracts, the amount of the two mortgages and the cash payment to be made shows a mutual dependence between the transactions referred to, and indicates clearly that what was in contemplation was an exchange of lands and the payment in cash of the net difference between the agreed prices. (See *Richards v. Edick*, 17 Barb. [N. Y.] 260. 263, and *Jugla et al. v. Trouttet*, 120 N. Y. 21, 27.)

Other details of the agreement, not specifically covered, could doubtless be supplied by reference to the usual course of business relating to such matters (*Harrell v. Neef*, 80 Kan. 348); but the memorandum is seriously defective in failing to describe the Oklahoma

---

Hampe v. Sage.

---

land or to state any fact beyond its acreage and the county of its location that might help to identify it. The plaintiff sought to remedy the defect by pleading and proving that the defendant had previously showed him a certain tract in Pottawatomie county, Oklahoma, containing 760 acres, and that this was the land referred to in the contract. To allow the land to be identified in this manner would be to permit an essential element of the contract to be supplied by oral evidence. If the memorandum had contained the words, after the reference to the Oklahoma land, "being the tract recently showed by Sage to Hampe," doubtless proof that a particular tract had been so showed would be permissible, and would render the written contract definite. But we are not at liberty to supply such language, and without it the case must fail.

Perhaps the fact that the plaintiff's effort to attach a definite meaning to the description falls outside of the line that has been drawn by the decisions can best be shown by a consideration of how far they have gone upon a different but somewhat related question. It is said that "where it appears from extrinsic evidence that the vendor owns but one parcel of land answering the description in the memorandum, the courts are inclined to uphold a meager description of the property."

(20 Cyc. 271.) However indefinitely the property may be described, if the memorandum states that it belongs to one of the parties, and outside evidence shows that such party owns only one tract of the character indicated, the description is held to be sufficient. Thus in *White v. Breen*, 106 Ala. 159, it was said:

"The description afforded by bringing together the several letters would be, substantially: 'The three lots in Sheffield, Ala., belonging to Albert Breen, viz., the one located on Montgomery avenue and the two on Annapolis avenue'—the proof being that Breen then owned no other property in Sheffield than the lots in question. This is a sufficient description." (Page 171.)

---

Hampe v. Sage.

---

And in *Waring v. Ayres*, 40 N. Y. 357:

"An agreement to sell and convey the farm in the town of Bath, belonging to me, is definite and certain the moment it appears which farm in the town of Bath does in part [fact] belong to me." (Page 361.)

Some courts have held that where a party to an agreement undertakes to convey a piece of property he by implication asserts title to it, and a recital that he is its owner may be read into a written contract by which he agrees to sell it. The leading case on the subject is *Hurley & another v. Brown*, 98 Mass. 545, where it was said:

"The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own. . . . If the party who enters into the agreement in fact owns a parcel answering to the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption, the words 'a house and lot' on a street where the party who uses the language owns only one estate are as definite and precise as the words 'my house and lot' would be; a description the sufficiency of which has been placed beyond all doubt by very numerous authorities. . . . In both cases the same extrinsic evidence must be resorted to, by the aid of which all uncertainty is removed. Where the words used are 'my estate' in a particular locality, oral evidence is necessary to show what estate the vendor did own." (Pages 547, 548.)

This theory was rejected in *Draper v. Hoops*, 135 Ill. App. 388, but adopted in *Ruzicka v. Hotovy*, 72 Neb. 589. The Massachusetts case was cited with approval and its doctrine applied by this court in *Bacon v. Leslie*, 50 Kan. 494, under circumstances thus stated in the syllabus:

"The defendant signed and delivered to the plaintiff a written contract concerning the transfer and sale of

---

Hampe v. Sage.

---

certain real estate. The description of defendant's land was as follows: '½ of section 7—23—7, and all of section 18—23—7, in Sycamore township, Butler county, Kansas.' *Held*, that the contract as to '½ of section 7—23—7' was not void for indefiniteness or uncertainty, but was valid, and would be specifically enforced if it were alleged in the petition, and established upon the trial, which half of 'section 7' defendant actually owned at the date of the written contract, and that at that date he owned no other land in 'section 7.' Parol evidence, in such a case, to identify '½ of section 7' owned by the defendant, is admissible."

If Hampe had pleaded and proved that Sage owned 760 acres of land in Pottawatomie county, Oklahoma, and no more, an entirely different question would be presented. Under the authorities cited, a recital that Sage owned the land which he undertook to convey can be found in the contract itself, by a liberal interpretation of its terms. Proof that he owned no other land in that county would then render the description, as so interpreted, absolutely definite. But as we can not find in the memorandum, by any liberality of construction, a statement that Sage had showed to Hampe the land therein referred to, evidence as to what land had in fact been shown could not aid the description. Parol evidence is admissible to apply the description, but not to supply it.

"If the designation is so definite that the purchaser knows exactly what he is buying, and the seller knows what he is selling, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough. Parol evidence may be resorted to for the purpose of identifying the description with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing." (29 A. & E. Encycl. of L. 866.)

The judgment is reversed and the cause remanded, with directions to sustain the demurrer to the petition.

LEE MCCULLOUGH *et al.*, a Partnership, *etc.*, Appellees,  
v. THE S. J. HAYDE CONTRACTING COMPANY *et al.*,  
Appellants.

No. 18,888.

SYLLABUS BY THE COURT.

1. **CONTRACTS**—*Performance Except in Certain Particulars—Damages—Expense of Completing Contract.* A subcontract for plumbing and heating work in a building, amounting to over \$7000, was performed except in certain particulars. A comparatively small expenditure was necessary to supply the omissions and remedy the defects. It is *held*, that the reasonable expense necessary to make the work conform to the contract is the proper measure of damages to be allowed to the owner upon his counterclaim in an action against him for the contract price.
2. **EVIDENCE**—*Opinions and Conclusions—Immaterial Error.* The admission in evidence of a general statement of the contractor to the effect that he had performed the contract fully is not prejudicial, when testimony relating to the various items is given and findings are made thereon relating to all the defects pleaded in the answer.
3. ——— *Collateral to the Issue—Cross-examination.* It was not error to restrict the evidence to the particular defects pleaded.
4. **PRACTICE, DISTRICT COURT**—*Consolidation of Actions—Amendment of Pleadings—Discretion.* The refusal of the court to permit the consolidation of this action with another action in which another party was impleaded, and in refusing to allow an amendment of the answer, were within the discretion of the court, which, in the circumstances shown, was not improperly exercised.

Appeal from Cloud district court; WILLIAM T. DILLON, judge. Opinion filed June 11, 1910. Modified.

A. L. Wilmoth, F. W. Sturges, and F. W. Sturges, jr.,  
for the appellants.

C. C. Coleman, F. L. Williams, Park B. Pulsifer, and  
Charles L. Hunt, for the appellees.

The opinion of the court was delivered by

BENSON, J.: This action is by a subcontractor for the foreclosure of a mechanic's lien. The S. J. Hayde Contracting Company entered into a contract with the Nazareth Convent and Academy to erect a building for the latter. The plaintiffs, McCullough and Bateman, entered into a subcontract for the plumbing work and to supply and place the heating apparatus in the building. Payments were made to the subcontractors as the work progressed, amounting to \$3800, and having, as they alleged, completed the work, they sued for the balance claimed upon the contract price and for extra work. The contracting company answered by admitting the subcontract, and alleging that it had not been faithfully performed by the plaintiffs, specifying eight particulars wherein they had failed, and pleading the alleged defects. The answer then stated:

"That by reason of the failure of the plaintiffs to perform the work and furnish the materials in manner and form and to the effect as required by said contract and specifications in the particulars enumerated, the defendants have suffered damage in the sum of \$500."

The answer concluded with an offer to allow judgment for \$3090, the amount sued for less the damages so claimed.

Before the trial the defendants moved for an order consolidating this action with another action previously commenced in the same court by the contracting company against McCullough and Bateman and their sureties for damages for the alleged failure of the plaintiffs in the present action to perform the subcontract. This motion was denied.

At the term in which the case stood for trial and in which it was tried the defendants asked leave to amend their answer instanter, by setting out more in detail the defects and defaults complained of. This was refused, on the ground that the proposed amendment



would unsettle the issues and might compel a continuance.

At the trial one of the plaintiffs was permitted to testify generally, over the defendants' objection, that they had done everything they had agreed to do under their contract, and had complied with all the specifications. The defendants attempted to cross-examine the witness, by inquiring into details of construction and workmanship not included in the particular specifications of defects in the answer, but were not permitted to do so.

Error is assigned upon the refusal to consolidate, the refusal of leave to amend the answer, and upon the rulings relating to the testimony just referred to.

The proposed consolidation was properly denied. Another party had been impleaded in the other action, and it is not apparent why that action should be prosecuted after the defendants had confessed by their pleading in this action that they still owed the plaintiffs over \$3000 on the contract, after deducting the damages claimed.

The refusal to allow the amendment was within the discretion of the court. It will be noticed that it was not proposed to allege any other defects than those specified, but only to set out in greater detail those already pleaded. On examination the answer shows that they were already sufficiently described.

The general statement of the witness to the effect that the agreement had been performed was not prejudicial. There was a full opportunity to cross-examine him upon all matters within the specifications, and the court heard evidence upon the various items and made full findings concerning them.

The evidence was properly confined to the issues made. To have permitted an inquiry into other details of the work in this great building would have been a useless waste of time, since only certain particular defects were claimed.

In the findings of the court some of the claims of the plaintiffs for extra work were not sustained. Certain claims of the defendants for damages were sustained, but the larger part was disallowed. Judgment was entered for the plaintiffs for more than the amount specified in the defendants' offer.

It was alleged in the specifications of defects that the steam risers in the exhibition room were left badly out of plumb, were not uniform, and were not placed according to the contract. Concerning this matter the court found:

"The plaintiffs so constructed the steam risers in what is called the front entrance room of said chapel building that they are out of plumb, as alleged by the defendants' seventh specification for damages in the answer, so that one of the said risers is out of plumb about three inches in a rise of about twenty-five feet, and the other is out of plumb about five inches in a rise of about twenty-five feet. There is no evidence to the effect that these defects in any way affect the utility of said risers of the heating plant, and no evidence was offered to show the difference in value of the building in question caused by these defects."

In view of the magnitude and cost of this building, and the purposes for which it was designed, it must be a grievous disappointment to its owners and the patrons of the institution to find in the front entrance to one of its principal rooms objects so out of harmony and offensive to the eye as these risers, thus deflected from their true position. Beauty and symmetry as well as utility were doubtless taken into consideration in making the plans and entering into the contract. We can not hold that the contract was complied with in this respect, nor can we approve the rule of damages suggested by the court. The cost of the building is not shown, but the heating and plumbing work alone amounted to over \$7000. The evidence showed that to remove the defective parts and do the work properly, as provided in the contract, and restore the building to

---

McCullough v. Hayde.

---

a proper condition, would cost less than \$300. If it should cost much more it ought to be done, and the reasonable expense of doing so in a workmanlike manner, and of complying with the contract in this respect, is a correct measure of damages in the situation here presented. The measure of damages suggested by the trial court, while applicable in a proper case, is not always exclusive, even when applicable. (*Kerns v. Kansas City*, 79 Kan. 562.) Where only particular items are necessary to complete a contract of this nature, otherwise substantially performed, a proper measure of damages is the reasonable expense of supplying the omissions or remedying the defects. (3 *Suth. Dam.*, 3d ed., § 699; *Smith & Nelson v. Bristol*, 33 Iowa, 24; *Haysler et al. v. Owen*, 61 Mo. 270; *Keeler v. Herr*, 157 Ill. 57.) This rule is applicable to the present case, where the expense of replacing the defective parts is small as compared with the contract price, and is certainly favorable to the contractor.

Some other matters were discussed in the argument, but they are not considered material.

For the error in refusing to allow damages under the seventh specification of the answer the judgment must be modified, and the cause is remanded for a new trial of the issues presented by that part of the answer only. (Code 1909, § 307; *Leeman v. Page*, 79 Kan. 479.) The amount of the damages found upon such retrial must be deducted from the amount of the judgment.

S. F. WALTERS, *Appellee*, v. THE MISSOURI PACIFIC  
RAILWAY COMPANY, *Appellant*.

No. 16,589.

SYLLABUS BY THE COURT.

1. RAILROADS—*Duty to Stop Train Long Enough to Enable Passenger to Alight with Safety.* It is the duty of a railway company to use the highest degree of care which is reasonably practicable in transporting passengers and in setting them down at their destination, and the failure to stop a train at the destination of a passenger and afford him an opportunity to alight with safety is culpable negligence.
2. ——— *Contributory Negligence of Passenger Alighting from Moving Train under Direction of Conductor.* Where the railway company fails to stop its train at the destination of a passenger, and as it is passing the station the conductor of the train advises and directs the passenger to alight from the train while it is moving at a speed of from three to four miles an hour, the question whether the passenger who acts on the direction of the conductor and is injured is guilty of contributory negligence is one for the determination of the jury.
3. SPECIAL FINDINGS—*Consistency—Evidence—Duty of Jury to Follow Instructions.* The special findings of the jury examined and found not to be without support in the evidence nor contrary to the instructions of the court, and not inconsistent with the general verdict.

Appeal from Marshall district court; SAM KIMBLE, judge. Opinion filed June 11, 1910. Affirmed.

W. J. Gregg, James W. Orr, and B. P. Waggener, for the appellant.

W. W. Redmond, and Theo. H. Polack, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This litigation, instituted to recover for injuries sustained by a passenger while alighting from a train, is here for a second review. (*Railway Co. v. Walters*, 78 Kan. 39.) In his petition

S. F. Walters alleged that on July 25, 1903, he was a passenger on a train of the Missouri Pacific Railway Company due to arrive at Bigelow at about four o'clock in the morning, and as the train approached his destination the conductor in charge of the train came into the car in which he was riding and directed him to go out upon the platform of the car and down upon the lower step, and that, relying upon the skill and prudence of the conductor, he did so, and in obedience to the order of the conductor he undertook to alight from the train, believing it safe to do so; that just as he was about to alight the conductor "signaled the train to proceed, and, without any notice to plaintiff, said train suddenly jerked forward, and in consequence of the aforesaid acts of the conductor plaintiff was jerked and thrown violently from the train, by reason whereof, and the jolt and shock incident thereto, the plaintiff sustained severe injuries to his spine, and further injury to his person and nerves in general as to produce hydrocele, by reason of which, and the said injury to his spine, plaintiff has been greatly and permanently injured."

At the trial Walters offered testimony tending to show that on the night in question he was a passenger for hire on the train of the railway company, and that as he approached the station the conductor came in and told him, "This is Bigelow, come on"; that he followed the conductor out of the car, and that the conductor directed him to "get down there on that step, and don't step straight out, but step with the train, so it won't hurt you, and be quick about it." He stated that the night was cloudy and somewhat dark, and when the coach had passed the depot about sixty feet he stepped off the train and sustained the injuries for which the action was brought. A witness who came to get the mail sack thrown from the same train testified that as the train passed the station a passenger was standing on the steps, and the conductor was above him with

---

Walters v. Railway Co.

---

a lantern in his hand; that he heard the conductor tell the passenger, who turned out to be Walters, to face the way the train was going or he would fall. The witness said the train did not stop, but was moving at the rate of about six miles an hour, and also that the conductor gave the "high ball," or go ahead sign, over the head of the passenger, who was standing on the lower step. There was also testimony that on the return trip the conductor inquired of the mail carrier if Walters was badly hurt, and that he also made inquiry as to the age and family of Walters. Testimony of a contrary nature was given by the trainmen, but the general verdict of the jury was in favor of Walters, and with it were returned answers to a number of special questions that were submitted.

It is contended by appellant that the court should have directed a verdict in favor of the railway company. It was the duty of the railway company to exercise the highest degree of care which was reasonably practicable in transporting this passenger, and also in setting him down at his destination; and the failure of the company to stop the train long enough to enable him to alight with safety, as the jury found in this case, was culpable negligence. (*A. T. & S. F. Rld. Co. v. Hughes*, 55 Kan. 491; *Railway Co. v. Walters*, 78 Kan. 39; *Railway Co. v. Wimmer*, 72 Kan. 566.)

It is insisted, however, that as Walters voluntarily alighted from the train when it was in motion the trial court should have held as a matter of law that his own negligence barred a recovery. There is, of course, some danger in getting off a moving train, however slow the rate of speed, but it can not be said as a matter of law that every case of boarding or alighting from a train in motion, without regard to the speed or the circumstances under which it is done, renders the passenger guilty of contributory negligence. In *A. T. & S. F. Rld. Co. v. McCandliss, Adm'r*, 33 Kan. 366, it was said that "stepping from a train of cars in motion

to a stationary platform, or to the stationary ground, which is more dangerous, is not always culpably dangerous and is not negligence *per se*." (Page 373.) In *A. T. & S. F. Rld. Co. v. Hughes*, 55 Kan. 491, where the conductor failed to bring his train to a stop, but directed the passenger to alight while it was in motion, the contention was made that the attempt to alight, with or without the invitation or order of the conductor, was contributory negligence. It was there said:

"It is not contributory negligence *per se* for a passenger to leave a train which is in motion. Of course, a passenger must exercise ordinary care, and if he voluntarily places himself in a perilous position, and incurs a danger so obvious that an ordinarily prudent man would not encounter it, there can be no recovery. Whether the act of Hughes in leaving the train while it was in motion constitutes contributory negligence barring a recovery depends upon whether the danger was so patent that a prudent man under the circumstances would not have made the attempt. We think it was clearly a question of fact for the jury to determine." (Page 498.)

Along the same line see: *S. K. Rly. Co. v. Sanford*, 45 Kan. 372; *Railway Co. v. Loewe*, 69 Kan. 843; *Railway Co. v. Holloway*, 71 Kan. 1.

Of course, exceptional cases may be surmised of a passenger jumping from a train where the speed was so great, the danger so obvious and the circumstances such that a court would be justified in directing a verdict against the passenger. The present case does not fall within that class. When Walters approached Bigelow and was escorted by the conductor to the platform of the coach he had a right to assume that the train would be brought to a stop. When he went down upon the lower step of the coach he must have known that the train was still in motion, but it appears that it was then going at the speed of about three to four miles an hour. Passing by the station without stop-

---

Walters v. Railway Co.

---

ping and carrying him away from his home would naturally have a tendency to disturb him. At that time the conductor advised him as to the manner of alighting, and also gave him the imperative direction to get off the train and do it quickly. In view of these circumstances, including the speed of the train and the direction of the conductor to alight, the matter of contributory negligence was a fair question for the determination of the jury. (*Cumberland Valley Railroad Co. v. Maugans*, 61 Md. 53; *New York, Phila. and Norfolk R. R. Co. v. Coulbourn*, 69 Md. 360; *The Louisville and Nashville Railroad Company v. Crunk*, 119 Ind. 542; *Penna. R. Co. v. Lyons*, 129 Pa. St. 113; *Carr v. Eel River, etc., R. R. Co.*, 98 Cal. 366, 21 L. R. A. 354, and note; 3 Thomp. Com. L. of Neg. § 3027; 6 Cyc. 643.)

It is argued that whatever may be the true rule on this question the instructions given by the trial court constituted the law of the case, which the jury were bound to observe, and that the jury in their findings went contrary to the instructions, and therefore there should be a reversal. In one of its instructions the court told the jury in effect that if an ordinarily careful and prudent person would not, under the circumstances which surrounded Walters when he alighted from the train at the time of the injury, have stepped from the train while it was in motion the plaintiff was necessarily negligent and can not recover. In a later instruction the jury were told:

"I instruct you as a matter of law that it is contributory negligence for a passenger on a train to undertake to alight from it in the darkness of the night, while it is in motion at the rate of from two to six miles an hour, without any light to guide his steps or movements."

The jury found that the train was in motion when Walters alighted, and that it was moving at a speed of from three to four miles an hour, and it is therefore argued that the finding necessarily violated the in-



struction of the court. Leaving out of the question the correctness of the instruction quoted, it will be seen that it clearly involves other considerations than that the train was in motion and moving at the rate of speed mentioned by the court. It will be observed, too, that the instruction includes the darkness of the night when the passenger alighted, and when there was no light to guide his steps or movements. While Walters alighted from the train on the morning of July 26, between half past three and four o'clock, it was also found by the jury that it was not then so dark as to prevent Walters from seeing where he was stepping when he alighted. As the element of darkness is lacking the argument of appellant that the jury disregarded the instruction is not good.

It is further contended that the jury must have violated an instruction to the effect that the direction or advice of the conductor to the passenger to alight from the train while it was in motion was not sufficient reason to justify him in doing so. That single circumstance may not be sufficient to justify a passenger in stepping from a moving train. The speed might be so great, the danger so palpable and the surrounding circumstances such that it would be gross negligence to jump from the train, even upon the invitation or direction of the conductor. As we have seen, other circumstances entered into the consideration in this case, and hence it can not be said that the verdict violated the instruction of the court in this particular.

Another point of contention in the case was whether the hydrocele from which Walters was suffering resulted from the injury received when he alighted from the train or from an earlier injury which was inflicted while he was working as a section hand for the railway company, and for which settlement had been made and compensation paid. The court instructed the jury in substance that Walters could receive nothing because

---

Walters v. Railway Co.

---

of that injury or any condition resulting from it. The jury were asked the question whether on alighting from the train Walters sustained an injury called "hydrocele," and whether it was originally so caused or was a recurrence of a former complaint. The answer of the jury was, "recurrence." The appellant infers from this answer that the jury awarded damages for the previous injury, for which compensation had been made. Of course, no recovery could be had for that injury, but if Walters had been cured of the disease of hydrocele resulting from the first injury, as the physicians of the railway company had decided when he was discharged from the hospital, and the later injury brought on the same disease or condition, no reason is seen why he could not recover for the consequences of the injury. Apart from that consideration, the jury found that other injuries than hydrocele resulted from the fall, and that in addition to this disease there were sprains of the back and the hips. A witness for the railway company, who is a physician, testified that when Walters returned to the hospital for treatment after the accident he was suffering from a sprain of the back and left hip, and that he then complained that the hydrocele had returned, but that the witness found no fluid in the sac and could discover no evidence of hydrocele. It can not be said that the injury for which appellee recovered was the earlier one, for which the company had settled, nor that it was not the one which resulted from falling from the train.

Appellant contends also that hydrocele is a disease which may be easily and permanently cured, and that the testimony shows that if Walters had submitted to a slight surgical operation he might have got rid of the disease. The court told the jury in substance that if by a reasonable and safe operation he might have been restored to health, and neglected or refused to submit to it, he would not be entitled to recover as for a permanent disability, but could only recover for the losses

---

Bailey v. Gas Co.

---

sustained up to the time reasonably necessary to perform the operation and to bring about his recovery. It was not an undisputed fact in the case that the hydrocele with which Walters was afflicted after falling from the train could have been removed by a surgical operation, nor that he could safely have submitted to an operation. A physician who examined him testified at length as to his condition, and stated that an operation could not have been performed with an assurance of a cure; that radical treatment was not advisable, and might terminate fatally.

On the testimony it can not be held that the award of damages is excessive and we discover no error in the proceedings which justifies a reversal. The judgment is affirmed.

---

A. W. BAILEY *et al.*, as Partners, etc., Appellees, v.  
THE FREDONIA GAS COMPANY, Appellant.

No. 16,591.

SYLLABUS BY THE COURT.

1. *CONTRACTS—Severable or Entire—Drilling Wells—Time of Payment.* A provision of a written contract that one party shall drill a certain number of wells, and in case gas is found in any or all of them in paying quantities the other party shall own and possess such well or wells by paying the cost of drilling the same, implies that a payment is due whenever a paying well has been drilled.
2. ——— *Abandonment—Action to Recover for Part Performed.* Where under such a contract a payment has become due, but the party liable therefor refuses to make it, contending that nothing need be paid until all the wells are completed, the party entitled to receive it has a right to abandon further work and sue for that already done.
3. ——— *Limitation of Actions.* Such an action is one upon the contract, and the statute of limitations applicable thereto is that relating to agreements in writing.

---

Bailey v. Gas Co.

---

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed June 11, 1910. Affirmed.

*J. T. Cooper, H. P. Farrelly, and T. R. Evans*, for the appellant.

*P. C. Young*, for the appellees.

The opinion of the court was delivered by

MASON, J.: The Fredonia Gas Company held a number of oil-and-gas leases. It entered into a written contract concerning them with two individuals, who afterward assigned their interests to the Illinois-Kansas Oil and Gas Company. The last-named company performed some work under the contract, on account of which it claimed that the other company became indebted to it in the sum of \$1154.75. It owed the firm of Bailey & Kammerer \$1046.42 upon a judgment, to secure the payment of which it assigned to them its claim against the Fredonia Gas Company. The firm sued and recovered thereon, and the defendant appeals. No serious question is raised as to the sufficiency of the assignment of the claim to Bailey & Kammerer, and none at all as to the assignment of the rights of the individual contractors to the Illinois-Kansas company. For simplicity in statement the case will be treated as though the contract had been made by the two companies, and as though this litigation were between them, the legal questions involved being the same as though that were the actual situation. The Fredonia company will be spoken of as the gas company and the Illinois-Kansas company as the oil company.

The substance of the contract was that the oil company was to drill five wells upon the land covered by the leases. Any well which produced oil was to belong to the oil company. Any well which produced gas in paying quantity, which was defined to mean at least 1,000,000 cubic feet a day, was to belong to the gas company, upon payment to the oil company of the

actual cost of drilling. The oil company drilled two wells which proved unproductive. According to its own evidence it then drilled a paying gas well, which the gas company accepted, but the cost of which it refused to pay upon the ground that no payment was due until all five wells had been drilled. On account of the dispute on this point, and consequent nonpayment of the cost of the third well, the oil company abandoned further operations. The gas company itself drilled the remaining two wells, which proved unproductive. At the trial it contended that the third well was not a paying one within the terms of the contract, and that the oil company had abandoned work because of a difficulty with its contractors, but the jury found against these contentions.

The substantial legal question in dispute is whether under the contract the oil company had a right to demand payment for the expense of drilling the third well before it drilled the fourth and fifth, and whether upon a refusal of payment it had a right to abandon further operations upon that account. The exact language of the agreement, so far as here material, is:

"Should gas be found in either or all of said wells in paying quantities as herein described, then and in that event the parties of the first part shall own and possess such well or wells by paying the second party the actual cost of drilling the same, together with the cost of tubing and other things necessary to protect said well.

"On the other hand if oil is found in either or all of the said wells, then and in that event wells so producing oil shall become and remain the absolute property of the party of the second part.

"It is further mutually agreed that the first party reserves the right to drill a well or wells upon said premises at such time as it may desire; and in the event it shall do so, should it in the drilling of a well discover oil instead of gas, said oil well shall become the absolute property of the party of the second part, upon paying the party of the first part the cost of drilling the said well, together with the pipe and casing thereof.

"To make the matter plain, it is the intention of both

---

Bailey v. Gas Co.

---

parties hereto to develop said land; and that an oil well becomes the property of the second party; and a gas well becomes the property of the first party; provided that neither party shall be required to pay the price and cost of drilling any well as herein mentioned, unless the same produces oil or gas in paying quantities, as herein mentioned; but all gas wells of whatever capacity shall be the property of the first party and all oil wells of whatever capacity shall be the property of the second party; each party paying for the same, except second party may use gas in otherwise operating said leases."

The contract did not say in so many words that the cost of a paying well drilled by one party but falling to the ownership of the other was to be paid upon its completion, but that is the fair implication. No other time of payment was mentioned or suggested. If a paying gas well was drilled by the oil company, the gas company did not have an option to take it or leave it. The paragraph of the agreement last quoted shows that it became the property of the company at once, without any further negotiations. The paragraph first quoted provides that the gas company should own such a well by paying to the oil company the cost of drilling it. By one provision the title, with the right of possession and control, accrued at once, and by another it accrued upon the payment of the cost. It was therefore manifestly within the contemplation of the parties that the cost should be paid at once, without waiting for the full completion of the contract. The amount to be paid on account of each well was determined by the cost of that particular well. The contract was clearly severable. (See 20 L. R. A., n. s., 1069, note; 59 Am. St. Rep. 279, note.)

"A contract consisting of several distinct items and founded on a consideration which is apportioned to each item is severable. Thus, if A enters into a contract to supply machinery to B for a certain price, and to keep it in order for a yearly payment, he becomes entitled to recover the price of the machinery as soon as he delivers it, without waiting for the performance of the

---

rest of the contract." (1 Beach, Modern Law Cont. § 731.)

In *Carney v. Havens*, 23 Kan. 82, a contract involving compensation for separate transactions was held to be entire, so that no right of action arose until both were completed, but the decision was affected by the conduct of the parties as indicating the practical construction placed upon the agreement.

It being determined that the cost of the productive well was payable upon its completion, it follows that the refusal of the gas company to make payment until the other wells were drilled justified the oil company in abandoning the contract and suing for the agreed price of the work already done under it. In *Canal Company v. Gordon*, 73 U. S. 561, the right to pursue such a course was upheld under circumstances thus stated in the headnote:

"In a contract to make and complete a structure, with agreements for monthly payments, a failure to make a payment at the time specified is a breach which justifies the abandonment of the work, and entitles the contractor to recover a reasonable compensation for the work actually performed. And this notwithstanding a clause in the contract providing for the rate of interest which the deferred payment shall bear in case of failure."

(See, also, *Eastern Arkansas Hedge Fence Co. v. Tanner*, 67 Ark. 156; *Schwartz et ux. v. Saunders*, 46 Ill. 18; *Keeler v. Clifford*, 165 Ill. 544; *Stewart v. Many*, 7 Ill. App. 508; *Reybold v. Voorhees et al.*, 30 Pa. St. 116; *Bennett v. Shaughnessy*, 6 Utah, 273; *School District v. Hayne*, 46 Wis. 511; 13 L. R. A., n. s., 448, note.)

The gas company places some stress upon a further provision of the contract by which the oil company bound itself to proceed at once with the drilling of the wells, and to "continue its operations until all are completed." Like the other obligations assumed, however,

this one was dependent upon the performance of the agreement with respect to payments.

“Where work is done under a contract which provides for payment by installments at stated periods, and the payments are not made, the contractor may quit the work, and he will then be entitled to recover for all that he has done at the contract rates; and this notwithstanding the contract provides in express terms that the work shall be steadily prosecuted without intermission to final completion.” (*Bean v. Miller*, 69 Mo. 384, syllabus.)

Inasmuch as upon the facts found by the jury the oil company was justified in abandoning the contract, the gas company could not recover by way of set-off or otherwise for the expense of drilling the last two wells.

The action was brought more than three years, and less than five, after the third well was completed. The gas company maintains that the three-year statute of limitation applies, and hence that the claim was barred. The obligation sought to be enforced grew “not remotely or ultimately, but immediately” out of the written contract, and the five-year statute governs. (25 Cyc. 1038.)

The right of the plaintiffs to maintain the action is challenged upon the ground that the claim sued upon was assigned to them as security. The rule adopted in *Manley v. Park*, 68 Kan. 400, that the holder of the legal title to a note may sue upon it, although not its beneficial owner, is not peculiar to instruments of that character. The case of *Stewart v. Price*, 64 Kan. 191, which was there overruled, was based upon an open account. Here, however, the plaintiffs were not merely nominally but actually real parties in interest.

The gas company complains of the admission of incompetent evidence, but the objections now urged do not appear to have been made at the trial.

Complaint is also made that the instructions assumed that the oil company ceased work either because it had not received the cost of the third well or because of



## Brick Co. v. Gas Co.

difficulty with the contractors. These were the only two reasons suggested by the evidence, and the failure to refer to the possibility of others was not prejudicial.

To the question whether the oil company had trouble with its drillers, and ceased operations on that account, the jury replied, "Yes, but not the exclusive cause." This answer had some tendency to support the gas company's version of the facts, but the general verdict of the jury must be deemed to imply a finding that if the payment had been made the oil company would have proceeded with the work.

The other specific errors assigned are covered by what has already been said. The judgment is affirmed.

THE CHANUTE BRICK AND TILE COMPANY, *Appellee*,  
v. THE GAS BELT FUEL COMPANY, *Appellant*.

No. 16,600.

SYLLABUS BY THE COURT.

1. **CONTRACTS**—*Acceptance of Benefits by One Not a Party or Assignee.* If a written contract executed by A and B be accepted by C, and acted upon by A and C, although the contract be not assigned by B it becomes the contract of C as fully as if formally assigned to him.
2. ——— *Construction—Parol Evidence.* The intention of the parties to a contract is to be determined primarily by the language employed therein, construed in its ordinary meaning. If a provision be fairly susceptible of two meanings, then the general scope and purpose of the entire transaction and all the surrounding circumstances are to be considered in determining which meaning was intended.
3. ——— *Enforcement—Fairness—Agreement Not Unconscionable.* Equity will not enforce an unconscionable contract; but the mere fact that one provision of a legal contract, or even the entire contract, is more favorable to one party than to the other does not ordinarily render it unconscionable.

Appeal from Neosho district court; S. W. BREWSTER, judge *pro tem*. Opinion filed June 11, 1910. Affirmed.

*John J. Jones, and James W. Reid, for the appellant.  
H. P. Farrelly, and T. R. Evans, for the appellee.*

The opinion of the court was delivered by

SMITH, J.: The findings of the court are in substance that W. B. Hill, in making the contract marked "Exhibit A," was promoting a corporation, afterward incorporated as the Gas Belt Fuel Company, and that Hill made the contract for the benefit of the gas company after it should be incorporated; that W. S. Cochran, as trustee, was expressly acting for the plaintiff brick company; that no formal assignment of the contract was made by Hill to the defendant gas company, but the defendant accepted the contract and derived benefits therefrom, with the acquiescence of the plaintiff; that the plaintiff applied for gas within the time specified in the contract, and the defendant furnished it under the contract three or four months, and received pay therefor at the price stipulated; that the defendant then shut off the gas, and afterward a temporary contract was made; that in this temporary contract the claim of the defendant that it was not bound by the Hill contract was recognized, but it was expressly provided that the rights of neither party under it should be affected by the temporary contract.

It is contended by the defendant that the finding of the court that it accepted the contract of Hill with the plaintiff and supplied the plaintiff with gas thereunder is against the weight of the evidence; but it admits that the evidence as to this fact is conflicting. If so, the finding is conclusive here. The circumstance that the defendant seems to have adopted other provisions of the Hill contract and acquired substantial benefits thereunder may have been considered by the court, and properly, in determining the preponderance of the evidence.

The defendant contends that the plaintiff never performed or offered to perform the conditions of the

## Brick Co. v. Gas Co.

contract, even if "Exhibit A" did become the contract between the two corporations, in that it never took or proposed to take all the gas used in its business. Whether it was obligated to do so depends on the construction to be given to the twelfth paragraph of the contract, especially this portion thereof:

"The Chanute Brick and Tile Company . . . shall have all the gas it may need for the operation of its plant, but not to exceed an average of 2,000,000 cubic feet daily, and at the same price and for the same length of time as any other company or manufacturing industry interested in the pipe line."

This amounts to an express undertaking on the part of Hill to supply gas to the plaintiff, and if the defendant accepted the contract and acted thereunder it became the written contract of the latter. (*Marks v. Chumos*, ante, p. 562.)

The question then is, What does this provision mean? The defendant correctly says that the language should be interpreted in its ordinary meaning. If, so construed, it is found to be ambiguous and susceptible of two meanings, all the circumstances under which it was made should be considered in determining which meaning was intended, viz., whether it means all the gas used by the plaintiff in the operation of its plant, as contended by the defendant, or all the gas it wanted or required, as contended by the plaintiff and found by the court. The defendant in its brief, presumably in accordance with the evidence, says that at the time the contract was made the plaintiff had 1325 acres of leased gas land, with from 3,000,000 to 4,000,000 cubic feet daily capacity already developed, in addition to the leases to be assigned to Hill, and in the same field. If under these circumstances it were the intention of the parties that the plaintiff should take of the defendant all the gas used in the operation of its plant, it would have been natural to have plainly and unequivocally so provided. Under such circumstances the

---

Brick Co. v. Gas Co.

---

plaintiff would naturally use its own gas in preference to buying, and at the same time might reasonably desire to make this provision in case at any time its gas proved insufficient. On the other hand, Hill, in the interest of his proposed gas company, would naturally desire to furnish all the gas that the plaintiff would use. Considering the language and all the circumstances, the court construed the quoted language to mean "all the gas wanted or required for the operation of its plant." We can not say that the court erred therein. Accordingly, the court found that the plaintiff had complied fully with the contract on its part. In other words, the court found that the plaintiff came into court with clean hands.

Again, it is urged by the defendant that the contract, so construed, is inequitable, in that the defendant could not make a profit in furnishing gas intermittently to supply the emergency demands of the plaintiff. Equity does not require, before enforcing a contract, that it be shown to be profitable to the party required to perform it. It is usually not necessary to invoke the action of the court to compel performance under such circumstances. Equity does refuse to enforce a contract, even though legal, in which the party seeking the redress has so far overreached his adversary that the contract is unconscionable. This provision of the contract does, indeed, seem burdensome to the defendant; but this matters little. The contract is to be considered as a whole. Considering the plaintiff and the defendant as the parties to the contract, it must be borne in mind that by its terms the defendant acquired gas leases, pipe lines and machinery for a price not to exceed \$50,000, which may have proven much more valuable, and that it sold to the plaintiff \$7500 worth of its stock at par value, which may have been more than its actual value. The court found that

---

The State v. Topeka Club.

---

the contract was fair and mutually advantageous at the time it was made, and the finding seems to be supported by evidence.

The judgment is affirmed.

---

THE STATE OF KANSAS, *ex rel. Fred S. Jackson, as Attorney-general, Plaintiff*, v. THE TOPEKA CLUB, *Defendant*.

No. 16,603.

SYLLABUS BY THE COURT.

1. **CONSTITUTIONAL LAW—Title of Act—Statutory Construction.** When a statute is attacked as being in violation of section 16 of article 2 of the constitution, for the reason that it is not within the title of the act, such title will be liberally interpreted for the purpose of upholding the law.
2. ——— *Same.* It is not necessary that the title contain every detail of the entire act. It will be sufficient if it fairly indicates, though in general terms, its scope and purpose. "Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the body of the act without violating the constitutional inhibition." (*Lynch v. Chase*, 55 Kan. 367.)
3. ——— *Statute Relating to Intoxicating Liquors Held Valid.* Section 4371 of the General Statutes of 1909, being originally section 16 of chapter 128 of the Laws of 1881, the title to which enactment reads, "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," is within such title and is not unconstitutional.

Original proceeding in quo warranto. Opinion filed June 11, 1910. Judgment for the plaintiff.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, *Charles D. Shukers*, special

---

The State v. Topeka Club.

---

assistant attorney-general, and *J. J. Schenck*, county attorney, for the plaintiff.

*Charles Blood Smith*, and *John F. Switzer*, for the defendant.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced in this court by the state to oust, enjoin and prohibit the Topeka Club, a corporation, from permitting intoxicating liquors to be stored, used, kept or delivered on its premises for the purpose of being used as a beverage, and from permitting people to resort there for the purpose of drinking intoxicating liquors as a beverage. The facts are substantially as follow:

The Topeka Club has been an incorporated body for twenty years. Its members are stockholders, and consist of prominent business and professional men who reside in the city of Topeka, except a few of its members, who are nonresidents of the city. The club owns a commodious building on Harrison and Sixth streets, which is provided with all the furniture and equipments necessary for the purposes of the club. The object of the club, as stated in its charter and as evidenced by the manner in which it has been conducted, is to furnish social enjoyment for its members and their families. It has a capital stock of \$100,000, which is divided into 500 shares, of the value of \$200 each. The building has three floors, and is arranged so that the wives and families of the members can procure meals and hold social entertainments, card parties, receptions and other social functions there. This feature has been largely patronized. The clubhouse is conveniently located with reference to both the business and the residence portions of the city. It has parlors, dining rooms, reception rooms, card rooms, reading rooms, sleeping rooms, a kitchen, and every equipment for social entertainment. Meals are served

---

The State v. Topeka Club.

---

regularly and members constantly patronize the dining rooms, and a few members make the club their permanent home. The management of the entire house is in charge of a steward, who resides in the building and is held responsible for the manner in which the club is conducted.

There is a room in the building called the "locker room," where there are eighty-seven lockers, furnished for the use and convenience of the members who desire them. These lockers are compartments fourteen by fifteen by eighteen inches. They are built like a filing cabinet or case of pigeonholes. Each locker has a door and lock and key, the key being in the possession of the owner. The locker may be used by the owner in which to keep anything desired. Its size and shape make it a very convenient place to keep bottles of beer, wine, whisky or other intoxicating liquors such as are sometimes used as a beverage at banquets and other social functions. These lockers are used principally for the safe-keeping of such liquors. Only fifteen members have lockers. The club does not furnish or purchase the liquor for those who have lockers. The employees of the club have nothing whatever to do with the liquor, except that when a member wishes to use some of the liquor belonging to him he furnishes a locker key to a waiter, who is authorized to procure the liquor and serve it. The glasses, ice and other things used in serving the liquor are the property of the club. The club does not receive anything, either directly or indirectly, for the liquors thus consumed; they belong to the member. At the time this action was commenced the club had 140 members.

Upon these facts the state presents a complaint which in its charging part reads:

"That the said defendant, the Topeka Club, in violation of the laws of the state of Kansas, and without authority therefor under its charter, as hereinbefore set out, now does exercise, and continuously for more

---

The State v. Topeka Club.

---

than five years last past has exercised, within the city of Topeka, Shawnee county, Kansas, the corporate right and franchise of keeping and maintaining a place where persons are and have been permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are and have been kept for delivery to such persons in violation of law, and does now exercise, and continuously for more than five years last past, within the city of Topeka, Shawnee county, Kansas, has exercised, the corporate right and franchise of keeping a place for the storage of intoxicating liquors, to be there *used as a beverage*, and of keeping ice, glasses, tables, chairs, ice boxes and other furniture, fixtures and property to be used in using such intoxicating liquors as a beverage at the place kept and maintained by the said defendant, where persons are and have been permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are and have been kept for delivery in violation of law; and that the said defendant does now exercise, and continuously for more than five years last past has exercised, within the city of Topeka, Shawnee county, Kansas, the corporate right and franchise of keeping and maintaining a club-room and place in which intoxicating liquors are and have been *received and kept for the purpose of use as a beverage*, all contrary to the form of the statutes in such cases made and provided and in violation of the corporate rights, privileges and powers conferred by the charter of said defendant upon said defendant."

The real point to this charge is that the Topeka Club keeps and maintains a place where intoxicating liquors are permitted by it to be stored and kept for use by its members as a beverage, and beyond this permits members to bring a limited number of friends to participate with them in this convivial pleasure. It is claimed by the state that this violates section 4371 of the General Statutes of 1909 (Laws 1881, ch. 128, § 16), which reads:

"Every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist or



---

The State v. Topeka Club.

---

abet in keeping or maintaining any clubroom or other place in which any intoxicating liquor is received or kept for the purpose of *use*, gift, barter or sale *as a beverage*, or for distribution or division among the members of any club or association by any means whatever," etc.

It seems clear that the purpose of the locker system, and its only purpose, is to enable members of the club to have intoxicating liquors where they can be readily obtained for consumption as a beverage by themselves and their invited guests. It does not seem unreasonable, therefore, to say that the Topeka Club keeps and maintains a place where intoxicating liquors are received and kept for *use as a beverage*. This clearly violates the law.

It is urged, however, that such an interpretation of the statute makes it unconstitutional, as violative of section 16 of article 2 of the constitution, and the case of *The State v. Barrett*, 27 Kan. 213, is cited in support of this proposition. In our view that case does not go to the extent claimed by the defendant. It was there decided that section 19 of chapter 128 of the Laws of 1881, which prohibits persons from becoming intoxicated, was unconstitutional for the reason that becoming intoxicated is an offense not included in the title to the act. This action is brought under section 16 of the same chapter, and is therefore covered by the same title. The title does not embrace anything but the manufacture and sale of intoxicating liquors. It is argued that if becoming intoxicated is outside of the title it must be held that keeping intoxicating liquors for use as a beverage is also outside thereof, as it does not pertain to either the *manufacture* or *sale* of intoxicating liquors, and that the provision forbidding such act must for that reason be void under the clause of the constitution above mentioned. It is also contended that the use, keeping, storage or delivery of intoxicating liquor is not within this limitation and the statute prohibiting these acts is void.

---

The State v. Topeka Club.

---

It has always been the rule in this state to interpret titles to legislative enactments liberally, and not in a narrow or technical sense. In the case of *Lynch v. Chase*, 55 Kan. 367, it was said:

"It is not necessary that the title should be an abstract of the entire act, but it is deemed to be sufficient if the title fairly indicates, though in general terms, its scope and purposes. *Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the act without violating the constitutional inhibition.*" (Page 376.)

The expressed purpose of this act is to prohibit—that is, prevent—the sale of intoxicating liquors for other than the excepted purposes. The language used by Mr. Justice Brewer in the case of *The State v. Nickerson*, 30 Kan. 545, is pertinent here. It reads:

"By this section it is evident that the legislature recognized a fact, which is a matter of common knowledge, that human ingenuity is ever seeking some means to evade the prohibitions of the statute, and obtain a sale of liquors without transgressing the letter of the law; and intended to bring within the law and punish every disposition of liquor not expressly authorized and permitted." (Page 549.)

In the case of *Feibelman v. The State*, 130 Ala. 122, it was said:

"Our prohibition statutes very generally have provisions which are merely intended to be ancillary to, and to prevent evasions of, or to avoid difficulties of proof in respect of, their main purpose—to prevent the sale of intoxicants. For instance, it is quite usual for them to interdict the *giving away* of intoxicating liquors. Now it is not in the minds of the legislators that enough such liquor is going to be given away to constitute the evils intended to be eradicated; but it may well be that the prohibition of the sale could and would be evaded under the forms and color of gifts to such extent as to defeat in great measure the purpose of the statute. So, too, some of the statutes prohibit the sale, etc., of fruit preserved in alcoholic liquor, but this is not upon any idea that *bona fide*

---

The State v. Topeka Club.

---

sales or gifts of such fruits would emasculate the statute or would be an evil, but it is upon the other consideration that such sales, etc., would not be in good faith of the fruit, but that the fruit would be employed as a cover for transactions really involving sales of intoxicating liquors; and there is no doubt but that *bona fide* sales of fruit so preserved, not sales of the liquor preservative, may be prohibited because to allow such sales would open the door to mischievous evasions of the statute aimed at sales of intoxicating liquors." (Page 125.)

There is a collection of cases upon this subject in a note in 15 L. R. A., n. s., 430. It is there said (p. 431) that an Indiana statute relating to intoxicating liquors was entitled "An act to regulate and license the sale of spirituous liquors," etc. It prohibited the giving away of intoxicating liquors, and the question arose whether that provision was within the title of the law. The supreme court of Indiana held it to be properly connected with the subject embraced in the title, saying:

"One branch of the subject included in the title of the act in question is the licensing—the regulating—of the retail of intoxicating liquors. That subject includes the limitations as to time, place, person, quantity, etc., to be imposed upon the sale, and when we consider the object for which such a law was passed, viz., to prevent abuses that might flow from the unrestrained disposal of liquors in these respects, it would seem that the giving away under circumstances which might produce the same evil results as the selling would be a matter properly regulated in connection with the selling. Indeed it may be regarded as a necessary incident to a statute regulating the sale to secure its efficient operation. It is a necessary precautionary provision to prevent evasion of the prohibition to sell. All experience under license laws proves this." (*The State v. Adamson*, 14 Ind. 296, 297.)

(See, also, *Thomasson v. The State*, 15 Ind. 449; *Williams v. The State*, 48 Ind. 306.)

There is also a note with a collection of cases in 64 Am. St. Rep. 100, in which occurs the following:

"The title, 'An act to prohibit the sale of intoxicating liquors,' is not insufficient because of the fact that the

---

The State v. Topeka Club.

---

body of the statute makes it unlawful to 'sell' or 'give' the same away (*Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Cearfoss v. State*, 42 Md. 403; *Carson v. State*, 69 Ala. 235), or because of a provision in the act against the sale of Plantation Bitters, or other intoxicating bitters sold under the name of patent medicines (*Howell v. State*, 71 Ga. 224; 51 Am. Rep. 259)."

The legislature doubtless believed that if persons were permitted to maintain clubrooms in which liquor is kept for use as a beverage the practice, however innocent in itself when carried on in good faith, might easily be converted into a medium for the sale of liquor under the form of maintaining a club, and to prevent this practice forbade a course of conduct where sales if made would be difficult to detect and punish. This same principle was followed by this court in the case of *Munroe v. City of Lawrence*, 44 Kan. 607. In that case an ordinance of the city of Lawrence was upheld which prohibited the sale of sweet cider in quantities of less than one gallon. It was conceded that sweet cider is a wholesome and harmless beverage, and that there is nothing vicious in its sale. But it was held that where liquids are sold by the drink the opportunities and temptations to evade the law against the sale of intoxicating liquors, prohibited both by the state and the city, are so great that the ordinance was a proper regulation as a means to prevent unlawful sales of such liquors. Presumably for the same reason the legislature has now prohibited the sale of intoxicating liquors even for the excepted purposes (Laws 1909, ch. 164; Gen. Stat. 1909, § 4361 *et seq.*), as it has been shown by experience that such sales afford so great an opportunity to evade the law that it could not be effectively enforced.

The main and principal object of this statute does not seem to be merely to prevent people from drinking their own liquor as a beverage, but its real purpose is to prevent the organization of associations for the purpose of maintaining a place where a large number of

---

The State v. Topeka Club.

---

people are permitted to keep intoxicating liquor and use it as a beverage. The Topeka Club has 140 members, each of whom under the rules of the association may bring a limited number of guests to enjoy a convivial visit with him. This clubhouse is furnished with all the equipment necessary for an enjoyable "feast of reason and the flow of soul," and is well calculated to attract the patronage of those who enjoy pleasures of this character. It may be said to the credit of the Topeka Club that not more than fifteen of its 140 members have lockers and take advantage of this privilege. This, however, is due to the character of its membership rather than to the character of the organization. If it should be held that a law which interdicts this practice is unconstitutional and void, or that the right of a member of such an association to invite guests to the clubroom, and there, with other members and their guests, indulge in drinking without limit intoxicating liquors which he provides and keeps in store there for such purpose, is identical with his right to invite the same guests to the private hospitality of his home and there, as a part of the social pleasures of an evening's entertainment, provide a limited quantity of wine, beer, or other intoxicating liquors, it seems reasonable to assume that such organizations would rapidly multiply in number, and under the opportunities thus afforded the law would be evaded to such an extent that the difficulties already encountered in its enforcement would be greatly increased. It may be assumed that these considerations were well known to the legislature when this statute was enacted, and that the chief purpose of this section was to prevent a practice which might encourage and perhaps lead to sales of intoxicating liquors at such places. It is therefore fairly within the scope of the title of the act, and is not unconstitutional.

It may be said of this club that on account of the careful manner in which it has been managed no se-

---

Harris v. Defenbaugh.

---

rious objections have been urged against it, but under the rules and regulations which it has adopted an association of men inclined to violate the law and trespass upon the peace and good order of society might become a very unsatisfactory and objectionable institution.

Judgment for the plaintiff.

PORTER, J., not sitting.

---

J. M. HARRIS, *Appellant*, v. HARVEY DEFENBAUGH,  
*Appellee*.

No. 16,604.

J. M. HARRIS, *Appellant*, v. HARVEY DEFENBAUGH,  
*Appellee*.

No. 16,605.

SYLLABUS BY THE COURT.

1. PUBLICATION SERVICE—*Defendant Not Alive*. In an action quieting title to lands a judgment obtained on service by publication only is void where the action is not commenced until after the person named as defendant is dead.
2. ——— *Unknown Heirs—Order Authorizing Publication Service*. Where an attempt is made to obtain service by publication upon the unknown heirs or devisees of a defendant, under section 78 of the code (Gen. Stat. 1901, § 4512), without an order of the court authorizing the same, the service is void.
3. WILLS—*Nonresident—Record—Notice—Purchaser in Good Faith—Tax-deed Holder*. A tax-deed holder is not within the protection of section 9827 of the General Statutes of 1909, which provides that the title of a purchaser in good faith, without knowledge of a will, derived from the heirs of any person who is not a resident here at the time of his death shall not be defeated by the production of the will unless the same shall be offered for record within two years of the final probate. In order to bring himself within its protection he must be a purchaser in good faith and have acquired his title from the testator or the heirs or devisees of the testator.
4. LACHES—*Quieting Title—Plaintiff in Possession*. Laches is

---

Harris v. Defenbaugh.

---

ordinarily no defense in an action to quiet title or remove a cloud where the plaintiff is in possession.

5. ——— *Equitable Estoppel—Mere Lapse of Time Insufficient.* The doctrine of laches is founded to some extent upon the principles of equitable estoppel. Where, by reason of acquiescence or long lapse of time, there is a possible loss of testimony or increased difficulty of defense, the doctrine may be applied in the discretion of the court; but laches does not consist in mere lapse of time.
6. ——— *Defendant without Equitable Rights.* The doctrine of laches is never invoked in aid of a party where the equities are not in his favor.
7. ——— *Rights of Tax-deed Holder Not Equitable, but Statutory.* There are no equities in favor of a tax-deed holder as against the owner of land. The rights of a tax-title holder are purely statutory.
8. ——— *Action to Annul Tax Deed—Holder Not in Adverse Possession.* Laches can not be imputed to the owner of land for failure to begin an action to annul a tax deed, where the tax-title holder is not in adverse possession.
9. ——— *Quieting Title against Holder of Defective Tax Deed Less than Five Years Old.* Where the holder of the legal title to land brings an action to quiet his title, a defendant whose claim rests upon a defective tax deed less than five years old can not avail himself of the defense of laches on the ground that the plaintiff failed to pay the taxes, or to file his title papers for record or assert his ownership of the land by taking actual possession until after the defendant acquired his rights.

Appeal from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed June 11, 1910. Reversed.

*J. M. Harris*, for the appellant.

*Arthur H. Shay*, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff brought separate actions to quiet title to two quarter sections of land in Kearny county. The court found generally for the defendant, and the plaintiff appeals. The cases, being alike on the

---

Harris v. Defenbaugh.

---

facts, were consolidated in this court and submitted together.

There is no controversy as to the facts. Mansfield Young and Ruth E. Harris entered upon the land in 1892 and proved up on the same. In that year patents were issued, one to Mansfield Young and the other to Ruth E. Harris. In 1896 they sold the improvements, leaving the land vacant and unoccupied, and moved to Illinois, where they were married. Shortly thereafter Mansfield Young died leaving a will, wherein he devised all his property to his wife. In 1898 the wife died leaving a will, wherein all her property was devised to her sister and seven brothers, one of whom is the plaintiff, who afterward purchased the interests of the other devisees. The wills of Mansfield Young and Ruth E. Young were duly probated in Will county, Illinois, and on the 16th day of October, 1907, certified copies thereof were duly recorded in Kearny county, Kansas. The land at that time was still vacant and unoccupied.

The plaintiff, after filing his deeds and copies of the wills for record, paid the taxes on the land for 1907, and, on October 22, 1907, went upon the land and rented the same by written lease to one Morgan, a stock raiser, who has since used the land for grazing purposes. The plaintiff immediately thereafter brought these actions to quiet his title.

The defendant claims title through a warranty deed from one J. H. Robinson, who held a conveyance from F. C. Puckett, a tax-deed holder. Puckett obtained his tax deed in 1903, and shortly thereafter commenced a suit to quiet his title, making Mansfield Young and his unknown heirs and Mrs. Mansfield Young and Ruth E. Harris parties defendant. At the time he brought his action both Mansfield Young and Ruth E. Young were dead. He attempted to obtain service by publication, and, on the 23d day of June, 1903, a decree was rendered quieting his title. He afterward conveyed to Robinson, and Robinson conveyed to the defendant,



---

Harris v. Defenbaugh.

---

Defenbaugh. The defendant in his answer set up the Puckett tax deed and the Puckett judgment. At the time these actions were brought the tax deed was less than five years old, and was defective on its face, for the reason that it purported to convey a large number of disconnected tracts of land and failed to state the amount for which each separate tract was conveyed. (*Gibson v. Kueffer*, 69 Kan. 534; *Worden v. Cole*, 74 Kan. 226; *Smith v. Land Co.*, ante, p. 539.)

The judgment quieting title in Puckett was void for want of jurisdiction. Mansfield Young and Ruth E. Young were both dead. No effort was made to obtain service upon the unknown heirs and devisees of the wife, but an attempt was made to obtain service upon the unknown heirs and devisees of Mansfield Young. The attempted service, however, was void for the reason that no order was made authorizing publication upon such unknown heirs or devisees, as required by section 78 of the code then in force. (Gen. Stat. 1901, § 4512.)

In his answer the defendant also claimed that the plaintiff could not recover because copies of the wills of Mansfield Young and Ruth E. Young were not filed for record in Kearny county until after the defendant had acquired his title. This defense is based upon section 9827 of the General Statutes of 1909 (Gen. Stat. 1868, ch. 117, § 50), which provides that the title of a purchaser in good faith, without knowledge of a will, derived from the heirs of any person not a resident here at the time of his or her death shall not be defeated by the production of the will unless the same shall be offered for record in this state within two years of the final probate. This statute, however, can not avail the defendant. In order to bring himself within its protection he must be a purchaser in good faith (*Markley v. Kramer*, 66 Kan. 664, 666), and must have acquired his title from the heirs of the testator. He does not claim in privity with the makers of the wills, but claims

---

Harris v. Defenbaugh.

---

title by being a purchaser in good faith, relying upon the Puckett judgment and tax deed.

The main contention of the defendant, and the proposition upon which the court apparently decided the issues in his favor, is that the plaintiff lost his rights to the land by his laches in failing to assert his title sooner. The answer is not set out in full in the abstract, but from the argument in the briefs the contention appears to be that the plaintiff is guilty of laches in failing to pay the taxes upon the land and neglecting to file for record his conveyances and copies of the wills.

We are unable to discover how the defense of laches can apply to the facts in this case. In the first place, laches is ordinarily no defense in an action to quiet title or to remove a cloud where the plaintiff is in possession. (32 Cyc. 1345; *Ruckman v. Cory*, 129 U. S. 387; *Waldron v. Harvey*, 54 W. Va. 608; *Beck Lumber Co. v. Rupp*, 188 Ill. 562; *Hyde v. Redding*, 74 Cal. 493.) In the last case cited it was said:

“And where a plaintiff has been in possession of land he can not be guilty of laches in the bringing of a suit to remove a cloud at any time before an action has been brought to disturb his possession, or to deprive him of any enjoyment of his right. (*Liebrand v. Otts*, 56 Cal. 248.)” (Page 500.)

(See, also, Hogg's Eq. Prin. § 299.)

There are also many decisions to the effect that where the title upon which a claimant to real estate bases his right to equity is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply, but his rights are barred only by adverse possession; and in such cases on general principles equity will follow the law on the question of the statute of limitations. (*Higgins Oil & Fuel Co. v. Snow*, 113 Fed. 433; *Penrose v. Doherty*, 70 Ark. 256; *Moss v. Berry*, 53 Tex. 632; *Williams v. Conger*, 49 Tex. 582.) In the last case cited it was said:

“But we know of no authority to warrant the court’

---

Harris v. Defenbaugh.

---

in holding that the mere failure to pay taxes, or the laches or delay of the owner in bringing suit for the recovery of land to which he has a legal title, will defeat his action, where there has not been actual adverse possession for a sufficient length of time to support plea of limitation." (Page 602.)

But we need not rest our decision upon these grounds. The doctrine of laches is founded, to some extent at least, upon the principles of equitable estoppel. Where, by reason of acquiescence and long lapse of time, there is a possible loss of testimony or increased difficulty of defense, the doctrine may be applied in the discretion of the court; but laches does not consist in the mere lapse of time. (19 A. & E. Encycl. of L. 149.) In *Galliher v. Cadwell*, 145 U. S. 368, it was said:

"Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." (Syllabus.)

In the present case no neglect or delay of the plaintiff nor of his predecessors in title could have caused any prejudice to the defendant or altered his condition. The defendant took his conveyance, not in reliance upon the alleged abandonment of the owners, but upon the strength of the tax deed and the judgment purporting to quiet title in Puckett. How, then, can it be said that the failure of the plaintiff to file for record copies of the wills and the conveyances under which he derives his title has affected the defendant's ability to make defense? The claim of title of the defendant is not derived in any way from the testators of the wills or the grantors in the plaintiff's deeds. A large number of cases are cited where laches is held to be a defense, but they all proceed upon the theory that not mere delay, but delay that works a disadvantage to others, must be shown before the doctrine can be invoked. Cases holding that where the plaintiff has slept on his rights and permitted the defendant to make valuable improve-

---

Harris v. Defenbaugh.

---

ments on the property or to make large expenditures in reliance on his title he will be barred by laches have no application to the facts here. The land was vacant and unoccupied until the plaintiff took possession. Not a dollar has been laid out in improvements or expended by the defendant in reliance upon the plaintiff's attitude, and the defendant is in no position to invoke the doctrine of laches because of any change or alteration in his condition.

Moreover, the doctrine of laches is never invoked in aid of a party where the equities are not in his favor. There are no equities in favor of a tax-deed holder as against an owner of land. His rights are purely statutory. There are, therefore, no equities in favor of the defendant. The judgment under which he claims is void for want of jurisdiction, and his title depends solely upon the tax deed. The latter, being less than five years old and defective on its face, carried with it no constructive possession of the land, and started no statute of limitations running against the owner. (*Taylor v. Miles*, 5 Kan. 498; *Paine v. Spratley*, 5 Kan. 525; *Hall's Heirs v. Dodge*, 18 Kan. 277.) How, then, could a court of equity hold the owner bound by acquiescence, predicated upon mere lapse of time, or for failure to record his title papers, or to take actual possession of the land, or for any or all the reasons suggested? The statute gives the owner five years from the recording of a tax deed within which to contest its validity, where it is valid upon its face; and where it is void on its face, and the tax-title holder is not in actual possession, no statute of limitations runs against an action to annul it. Laches is never imputable to the owner of land for failure to begin an action to annul a tax deed where the tax-title holder is not in adverse possession. (*Cook v. Lasher*, 73 Fed. 701; *State v. Sponaugle et al.*, 45 W. Va. 415; *United States v. Insley*, 130 U. S. 263.)

To say to the owner of vacant, unoccupied land that

---

Harris v. Defenbaugh.

---

an action brought to quiet his title within the statutory period of five years against one claiming under a tax deed is barred because the claim is stale is carrying the doctrine of laches further than any of the decided cases of which we are aware. In Arizona, by statute, the scope of an action to quiet title is enlarged so as to permit a plaintiff to maintain it who is out of possession. Compare the facts in the present case upon which the claim of laches is based with those in *Costello v. Muheim*, 9 Ariz. 422, where the defense was interposed, and where the court used this language:

"Furthermore, we concur with the appellant's contention that the facts, as they appear in this record, do not show him to be guilty of laches. To hold, in an action to quiet title, that the plaintiff may not recover against a defendant who has been in possession for less than three years, for no other reason than that the plaintiff has failed to pay his taxes, or list his property for taxation, for a period of eleven years, while the defendant, holding a void tax deed to the property, has paid the taxes during the eleven years, and has, within three years, expended seven hundred and eighty dollars in improvements, extends the doctrine of laches to a degree not supported by any precedent cited to us. We are unwilling so to extend it. Plaintiff is not precluded by laches from maintaining this suit, unless by reason of his course defendant has been misled to his injury, or the property has, at defendant's risk and expense, been greatly enhanced in value while plaintiff lay by awaiting the turn of events to assert his claim, or unless some other facts exist, not now disclosed in this record, showing inequity in the plaintiff's position." (Page 430.)

The doctrine that one who has affirmatively, by words and conduct, assented to the claims of another is guilty of laches has no application to this case, because there were no circumstances which required the plaintiff to assert his rights. The rule is thus stated in volume 16 of the *Cyclopedia of Law and Procedure*, at page 159:

"But acquiescence of plaintiff in a conflicting claim

---

Harris v. Defenbaugh.

---

can not be inferred by the court where no circumstances appear which call upon plaintiff for assertion of his rights."

No law required the plaintiff to record his deeds or to file for record certified copies of the wills under which he claims. So long as there was no innocent purchaser who derived his title from the heirs of the testators or from the testators themselves, the failure to file for record copies of the wills could prejudice no one; nor was the owner guilty of any laches in failing to take possession of the land. The owner of land may use it as he sees fit. He may take it into his actual possession, or, if it suit his purposes better to leave it unoccupied and vacant, he can do so without danger thereby of losing his title, unless some person obtains possession and retains it adversely for a length of time sufficient to bar the owner's rights. Nor is the owner under any obligation to record his title papers. The recording acts protect the rights of innocent purchasers. To the holder of a tax title, whether valid or invalid, the owner owes no duty to record his title papers, nor to assert his claims, nor to acknowledge ownership by taking the land into his actual possession.

In *Hunter v. Hodgson* (Tex. Civ. App. 1906), 95 S. W. 637, it was held that parties claiming under a void tax deed could not avail themselves of the defense of laches and stale demand, as against the holder of the legal title, upon facts very similar to those in the present case. The case was decided by the Texas civil court of appeals, and the supreme court refused to allow an appeal. It was held in that case, as reported in 95 S. W. 637:

"The rights of one having the legal title to land not in the adverse possession of another are not affected by his mere nonclaim for many years, or failure to pay taxes, or the payment of taxes by another claiming under a void deed, though these facts suggest that the

---

Bowlus v. Iola.

---

parties may have supposed that the deed disposed of the property." (Syllabus.)

Upon the facts the plaintiff was entitled to judgment quieting his title against the claims of the defendant, except a lien for taxes. The judgment is reversed and the cause remanded for further proceedings in accordance herewith.

---

CLARA BOWLUS *et al.*, Appellants, v. THE CITY OF IOLA  
*et al.*, Appellees.

No. 16,716.

SYLLABUS BY THE COURT.

1. WORDS AND PHRASES—"Block"—*Assessment of Cost of Street Improvements*. In this case it is held that a tract of platted ground surrounded by streets and forming a portion of a city constitutes a "block" within the meaning of section 1374 of the General Statutes of 1909 (Laws 1905, ch. 116, § 1), relating to the method of assessing the cost of street improvements, although the donor of the plat divided the tract into two portions by an alley and designated each portion a block.
2. ESTOPPEL—*Municipal Corporation—Misinterpretation of a Statute—Assessment*. The fact that in previous similar cases the city acted upon a misinterpretation of the statute in assessing street improvements does not estop it from now proceeding according to law.

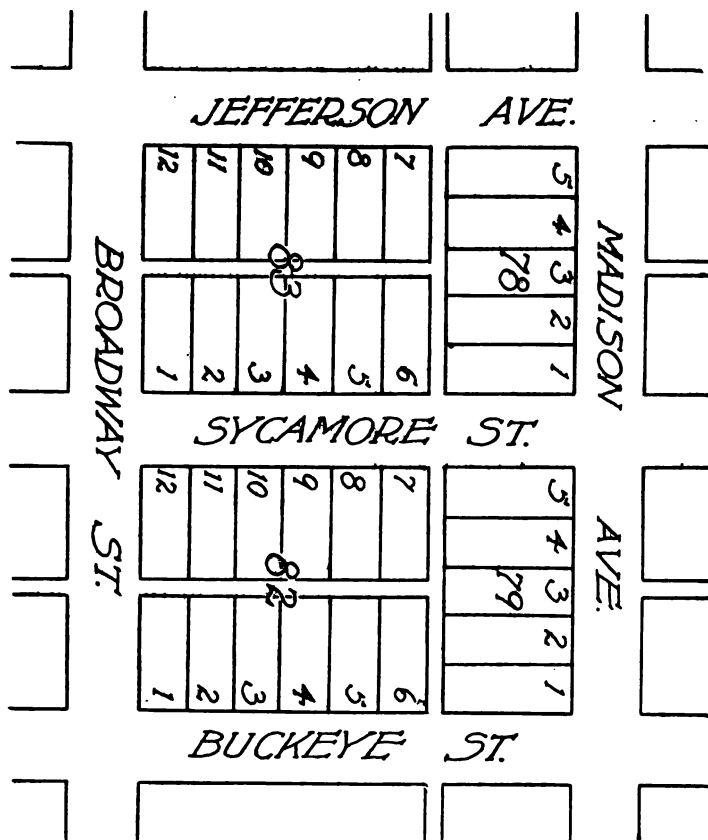
Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed June 11, 1910. Affirmed.

Altes H. Campbell, and John F. Goshorn, for the appellants.

Travis Morse, and G. E. Pees, for the appellees.

The opinion of the court was delivered by

BURCH, J.: The following sketch shows certain blocks, lots, streets, avenues and alleys as they appear on the plat of the city of Iola:



The plat bears the following legend: Avenues, 100 feet wide; streets, 80 feet wide; alleys, 15 feet wide.

It will be observed that tracts 79 and 82 are separated by unnamed ways fifteen feet wide, the same as those which run north and south through the centers



of tracts 82 and 83. Consequently such ways are alleys, and not streets or avenues.

The city paved Sycamore street, and in making the assessment to pay for the improvement treated the tracts designated on the plat as blocks 78 and 83 as forming one block, and treated what are called blocks 79 and 82 as forming one block. From a judgment sustaining the assessment, property owners in so-called blocks 78 and 79 appeal.

The statute reads as follows:

"Fourth, for paving . . . all streets, avenues, and alleys, . . . the assessments shall be made for each block separately, on all lots and pieces of ground to the center of the block on either side of such street or avenue, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley, according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon." (Gen. Stat. 1909, § 1374.)

The question is, What constitutes a "block" within the meaning of the statute?

The appellants argue that since the ordinary method of platting is into lots and blocks the legislature must have had in mind a block made by platting, and hence that the designation given by the donor of the plat controls. The premise is sound enough, but the conclusion does not follow. According to all the dictionaries and the popular understanding everywhere a block is a portion of a city surrounded by streets. In common practice city plats are made to conform to this understanding, and the legislature had in mind blocks so constituted, and not tracts arbitrarily designated as blocks by the donor of a plat. This interpretation accounts for the difference between the method of assessing the cost of street improvements and the method of assessing the cost of alley improvements. An alley is a narrow way designed for the special accommodation of the property it reaches. Consequently the cost of im-

---

The State v. White.

---

proving an alley is laid upon the abutting lots or ground. Streets and avenues are designed for general public travel, and consequently the cost of improving them is extended to the center of the tracts bounded by such thoroughfares. These views find support in the opinions delivered in the following cases: *City of Ottawa v. Barney*, 10 Kan. 270; *Olsson v. City of Topeka*, 42 Kan. 709; *McGrew v. Kansas City*, 64 Kan. 61.

The fact that the city has heretofore acted upon a misinterpretation of the statute in assessing street improvements where tracts like those numbered 78 and 79 were involved does not estop it from proceeding according to law in this instance.

The judgment of the district court is affirmed.

---

THE STATE OF KANSAS, *ex rel. Fred S. Jackson, as Attorney-general, etc., Appellant*, v. J. N. WHITE, *Appellee*.

No. 16,606.

THE STATE OF KANSAS, *ex rel. Fred S. Jackson, as Attorney-general, etc., Appellant*, v. ISAAC G. EYMAN, *Appellee*.

No. 16,607.

THE STATE OF KANSAS, *ex rel. Fred S. Jackson, as Attorney-general, etc., Appellant*, v. LAWRENCE G. EYMAN, *Appellee*.

No. 16,608.

SYLLABUS BY THE COURT.

SCHOOL LAND — Appraisement — Fraudulent Undervaluation — *Proof*. In an action by the state to set aside the appraisement of school land and to cancel certificates of purchase issued thereon it appears that land, which the evidence tends to show was worth from \$5 to \$10 per acre, was appraised at \$1.50 per acre, but that this was done through an honest exercise of judgment by appraisers fairly chosen, and no fraud is shown, unless inferable from the undervaluation so made. It is *held*, that the evidence is insufficient to sustain the charge of fraudulent undervaluation.

---

The State v. White.

---

Appeals from Kearny district court; WILLIAM H. THOMPSON, judge. Opinion filed June 11, 1910. Affirmed.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, and *Charles D. Shukers*, special assistant attorney-general, for the appellant; *John S. Dawson*, of counsel.

*A. M. Harvey*, *E. R. Thorpe*, and *Albert Hoskinson*, for the appellees.

The opinion of the court was delivered by

BENSON, J.: These cases were all tried upon the same evidence, although different tracts of land are involved.

The attorney-general sued to set aside appraisements of school land because of an alleged fraudulent undervaluation, and asked for cancellation of the certificates of purchase issued to the defendants, based upon such appraisements. All the land was appraised at \$1.50 per acre. In the petitions it was alleged that the land was reasonably worth from \$5 to \$10 per acre, and that the appraisers "negligently, willfully and without any consideration whatsoever of the true and reasonable value of the said plaintiff's land, and without examination of said land or any investigation as to the prevailing value of land of like character in that locality, appraised the said tract . . . [at] \$1.50 per acre, when in truth and in fact said land was worth from \$5 per acre to \$10 per acre, or more, which said appraisers . . . well knew or might have known by the simplest inquiry." It was alleged that this "wanton disregard" of duty "operated to defraud" the state. It was also alleged that the defendants knew that the appraisement was not the true value of the land, and that they consulted and conspired with the county superintendent to have such appraisers appointed and confirmed, hoping and believing that they

---

The State v. White.

---

would appraise the land negligently and partially in the defendants' behalf and against the interest of the state, and that the defendants aided and connived therein. It was further charged that the county commissioners, unmindful of their duty, confirmed the appointment of the appraisers without considering their interest or lack of interest or their competency.

On the trial the county superintendent testified that she made no particular investigation of the competency of the appraisers, but had known them all her life and considered them fair and disinterested; that one was a farmer, one a butcher, and one a blacksmith; that no one suggested their appointment, which was made upon her own judgment. She also testified that she expected that the land would be appraised higher than it was, because other land near by and in different parts of the county had been sold at a higher price; and that its value depended on the use to be made of it. The three county commissioners testified that they believed the appraisers to be good men and well qualified for the duty. The appraisers also testified that the land in their judgment was worth only \$1.50 per acre, although one of them said he thought it might be worth a little more; that they acted in good faith and made their appraisal upon a personal examination of the land. The defendants testified that the appraisal was the fair value of the land. These witnesses, or most of them, on cross-examination stated in substance that their testimony was based upon the usable value, which they distinguished from the speculative value, and that if the land was to be used for grazing or cultivation it would not be worth more than the appraised value. Several other witnesses living in the vicinity testified that the value of the land in question was from \$5 to \$10 per acre. The rental value of the land for grazing purposes was shown to be \$6.25 for a quarter section. It is situated in Kearny county, near Lakin, and other land near by of the same

character had been assessed for taxation at from \$480 to \$540 per quarter section. The chairman of the board of county commissioners is a brother-in-law of the county superintendent, and another county commissioner is a brother of one of the defendants. The court sustained a demurrer to the evidence summarized above, and the state appeals.

The statute under which the appraisement was made provides for the appointment of "three disinterested householders, residing in the county in which said land is situated, who, being first duly sworn by an officer authorized to administer oaths to faithfully perform their duties, shall appraise each legal subdivision of said land separately at its real value, and return their appraisement in writing, signed by them, to the clerk of the county." (Laws 1901, ch. 350, § 1; Gen. Stat. 1901, § 6339.)

It is insisted that the appraisal was made in violation of the oath of the appraisers; that there was no effort to ascertain the true value; that the valuation made was only about one-fourth of the true value; and that this is so unconscionable as to indicate fraud. It is argued that such inadequacy shocks the moral sense of fair-minded men, and proves official misconduct. It is also said that it has been the usual custom to appraise school land at from \$1.25 to \$1.50 per acre, while land in the vicinity was selling at \$5 to \$10 per acre, or more, and an appeal is made to the court to declare that such proceedings are fraudulent and will be set aside.

It will be observed that there was no evidence of any connivance or conspiracy between the officers and the appraisers or with the defendants, or fraudulent practices of any kind to cause an undervaluation. The only evidence in support of the alleged official misconduct or fraud in the appraisement is the testimony that the appraisement was greatly below the market value of the land. Where an appraisement is the result of a

---

The State v. White.

---

fair exercise of judgment and an honest expression of opinion it will not be set aside merely because other persons of equal honesty differ in their estimates of value. This court has said that while inadequacy of price is never alone sufficient to establish fraud, yet it may often be shown along with the other evidence as tending to show fraud. (*Douthitt v. Applegate*, 33 Kan. 395.) The same principle was applied in the case of a sheriff's sale, although it was said that great inadequacy of price is a circumstance to be regarded with suspicion, and slight additional circumstances only are required to authorize setting aside the sale. (*Means v. Rosevear*, 42 Kan. 377.) In this case no additional circumstances tending to show fraud are shown.

The fact of inadequacy of price rests upon conflicting evidence. On a demurrer to the evidence, however, the court can only determine whether there is any evidence fairly tending to prove every essential fact necessary to a recovery. (*Gifford v. Griffin*, 63 Kan. 716.) Therefore, in reviewing the ruling complained of, such inadequacy is considered as an established fact, but this alone, as held in the decisions cited, is insufficient to show fraud. The court is deeply sensible of the importance of preserving the school land from fraudulent misappropriation, and vigilant efforts to prevent it are to be commended, but the court can not go beyond the record to find facts not shown by the evidence.

The defendants contend that the action can not be maintained because an adequate remedy is given by appeal from the probate court, and that, unless appealed from, the finding of that court is conclusive. (Laws 1876, ch. 122, art. 14, §§ 5, 6; Gen. Stat. 1901, §§ 6345, 6346.) On the other hand, it is alleged and shown that the county superintendent refused to take the necessary steps for such appeal, although requested

---

Board of Education v. Allen County.

---

by the proper authority. Questions of importance are thus presented which in the light of the conclusion reached are not considered.

The judgment is affirmed.

---

THE BOARD OF EDUCATION OF THE CITY OF IOLA, *Appellant*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ALLEN *et al.*, *Appellees*.

No. 18,802.

SYLLABUS BY THE COURT.

1. CONSTITUTIONAL LAW—*Title of an Act.* The statute known as the "Barnes law" is not unconstitutional upon the ground that it violates section 16 of article 2 of the constitution.
2. COUNTY HIGH SCHOOLS—*Duty of County Commissioners to Make Tax Levy.* Where the county superintendent certifies to the board of county commissioners the amount necessary for the maintenance of the high schools in such county for the ensuing year, as prescribed by chapter 333 of the Laws of 1907, it is the duty of that body to make such levy as will produce the amount named, not exceeding the maximum levy fixed by section 15 of chapter 245 of the Laws of 1909.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed June 11, 1910. Reversed.

A. F. Florence, Travis Morse, and G. E. Pees, for the appellant.

H. A. Ewing, G. R. Gard, and S. A. Gard, for the appellees.

The opinion of the court was delivered by

GRAVES, J.: The board of education in the city of Iola made application to the district court of Allen county to compel the board of county commissioners to levy a tax of five-tenths of a mill upon the taxable property in that county for the maintenance of high

---

Board of Education v. Allen County.

---

schools established under what is known as the "Barnes law." An alternative writ was allowed, to which an answer was filed, and upon a trial a peremptory writ was refused and the board of education appeals.

There are seven high schools established in that county; one at each of the following cities: Iola, Humboldt, Gas City, La Harpe, Moran, Savonburg, and Elsmore. The method prescribed by statute for the levying of taxes for the maintenance of these schools is as follows:

Section 5 of chapter 397 of the Laws of 1905 (Gen. Stat. 1909, § 7796) provides that the principal of each high school shall, at the expiration of the school year, make a report under oath to the county superintendent, showing the total enrollment and the daily attendance of each pupil and the average daily attendance in his school for that year, and make such other reports as that officer may require. By section 1 of chapter 333 of the Laws of 1907 (Gen. Stat. 1909, § 7797) it is made the duty of the county superintendent to certify to the county clerk, on or before July 25 of each year, the average daily attendance in the several high schools of the county for the year ending June 30 preceding, and to certify to the board of county commissioners the amount necessary for the maintenance of such high schools for the ensuing year, and the county commissioners are required to make such a levy as may be necessary to produce such amount, not exceeding 3 mills on the dollar of the assessed valuation. By section 15 of chapter 245 of the Laws of 1909 (Gen. Stat. 1909, § 9408) the authority of the board of county commissioners is limited to a levy not in excess of five-tenths of a mill upon the dollar. It is provided in section 1 of chapter 333 of the Laws of 1907 (Gen. Stat. 1909, § 7797) that if the board of county commissioners fail to make the levy required by the certificate of the county superintendent that officer shall make a suitable



---

Board of Education v. Allen County.

---

levy and certify the same to the county clerk, who shall enter it upon the tax roll.

In this case the county superintendent sent the certificate to the board of county commissioners, as prescribed by law. This certificate showed that the sum of \$26,000 was necessary to maintain the high schools, and that the assessed valuation of taxable property in the county was \$30,875,000. The maximum levy permitted by the statute (five-tenths of a mill) would produce only \$15,437.50, leaving a deficit of more than \$10,000. It will be seen, therefore, that it was impossible for the board of county commissioners to make a levy sufficient to produce the amount required.

It is provided by section 27 of chapter 245 of the Laws of 1909 (Gen. Stat. 1909, § 9420) that where the officer or board charged with the duty of making a levy under this law is of the opinion that the amount of tax levy which may be made under the limitations of this act will be insufficient the question of an increased levy may be submitted to the voters of the taxing district, who may authorize the amount of the proposed increase, and if three-fourths of the votes cast at the election are in favor of such increase the officers may make the increased levy. The county commissioners, being unable to make a levy sufficient to raise the amount stated in the report of the county superintendent, decided after a full and conscientious examination into the subject that the sum of \$9262.50, which amount could be raised by a levy of three-tenths of a mill on the dollar, was amply sufficient to maintain the high schools, and that such amount was all that the county could fairly be compelled to contribute to that fund. In their answer to the alternative writ they show by a computation that this amount, together with what in their opinion would be reasonable for the cities where the schools are located to pay, would be sufficient for the suitable maintenance of the high schools; and they say that from considerations of jus-

---

Board of Education v. Allen County.

---

tice, and to protect the taxing power from abuse, they made a levy of only three-tenths of a mill on the dollar, believing that this would supply the needs of the schools.

The court, upon final hearing, refused to issue a peremptory writ. The board of county commissioners is doubtless well qualified to deal with this question, but the provisions of the statute seem to indicate a purpose to avoid its services in determining the amount of the tax levy for high-school purposes. We assume that the levy was caused to pass through its hands principally for the purpose of placing it in the ordinary channel of taxation, rather than for the purpose of obtaining the benefit of the judgment or experience of that body.

It is provided by section 5 of chapter 397 of the Laws of 1905 (Gen. Stat. 1909, § 7796) that the data from which the levy must be made shall be sent to the county superintendent of public instruction, and the amount necessary to be raised for high-school purposes is to be determined by that officer. The county commissioners have no voice whatever in determining that question. It is their duty to make such a levy as will produce the required amount as nearly as possible, within the limitations fixed by statute. When, as in this case, it appears that a levy sufficient to raise the desired amount can not be made, the question of an increased levy may be submitted to a vote of the people, as provided in section 27 of chapter 245 of the Laws of 1909 (Gen. Stat. 1909, § 9420). If this is not done, a levy should be made such as will produce the largest amount within the power of the officers whose duty it is to make the levy. Clearly it was the intention of the legislature that a fund should be provided for the support of the high schools, and every officer charged with the duty of enforcing the law in this respect should perform the duty imposed, as far as possible. The duty of estimating the amount necessary to maintain these schools suitably for the current year has been placed

upon the county superintendent of public instruction, and that officer has the exclusive power to perform that duty. The county commissioners have no power in the premises beyond making a levy. In this case five-tenths of a mill is the largest levy which they can make, but a levy to that extent should have been made. (*School District v. Wilson County*, post, p. 806.)

The power of the county commissioners to levy taxes for the support of high schools, as stated in section 1 of chapter 397 of the Laws of 1905, is superseded by the subsequent enactments of 1907 and 1909, which, being the latest expression of the legislature, must control.

We do not concur in the view that chapter 333 of the Laws of 1907 violates section 16 of article 2 of the constitution of the state.

The statute providing for submitting the question of an increased levy to the voters is permissive and not obligatory, and the failure to adopt this method of obtaining a sufficient levy is not a matter of estoppel.

It is stated in argument that the people in the county at large are compelled by this law to pay taxes for the support of high schools remote from their homes and in the management of which they have no voice. This is an inherent inconvenience that can not be avoided. High schools can not be situated within convenient distance of every residence in a large county. Every student in the county, however, is free to attend any high school in that county. This obviates, as far as possible, the criticism suggested, and removes any constitutional objection as to want of uniformity.

We conclude that the district court erred in not issuing the writ requiring the county commissioners to make a levy of five-tenths of a mill upon the dollar of the assessed valuation of the taxable property of the county, and the judgment is therefore reversed.

THE STATE OF KANSAS, *Appellee*, v. ORA TURNER,  
*Appellant*.

No. 16,891.

SYLLABUS BY THE COURT.

CRIMINAL LAW—*Evidence Procured by Intimidation—Involuntary Confessions—Self-incriminating Testimony.* At a trial on the charge of murder, neither the rule excluding proof of an involuntary confession nor that relating to self-incrimination forbids evidence that the defendant produced from a hiding place a revolver similar to that with which the homicide was known to have been committed, although such production was brought about by intimidation.

Appeal from Rice district court; JERMAIN W. BRINCKERHOFF, judge. Opinion filed June 11, 1910. Affirmed.

D. A. Banta, and W. W. Stahl, for the appellant.

Fred P. Green, county attorney, for the appellee;  
Samuel Jones, and Foley & Hopkins, of counsel.

The opinion of the court was delivered by

MASON, J.: Ora Turner was convicted of murder in the first degree and appeals. The questions presented are whether error was committed in the refusal of instructions and in the admission of evidence. The court gave one instruction regarding the effect of circumstantial evidence in the exact language of the second paragraph of the syllabus in *Carl Horne v. The State of Kansas*, 1 Kan. 42, and another substantially following what was said in *The State v. Furney*, 41 Kan. 115, 122, to be the correct rule. The instructions refused were practically but elaborations of the principles embodied in those given, and their refusal can not be regarded as material error.

The body of Roy Snyder, with whose murder the defendant was charged, was found on the highway, his death having resulted from several bullet wounds.

---

The State v. Turner.

---

Circumstances tended to indicate Turner as the murderer, and jealousy as the motive. Two bullets were recovered. They weighed substantially 149 grains each, and showed that they had been discharged from a barrel rifled with six grooves. Persons familiar with the subject said that the only firearm that would mark a bullet of that weight in such a manner was what is known as a Colt's 38-caliber "Police Positive" revolver, and an investigation was begun to learn whether a weapon of that description was owned in the neighborhood. It was learned that one had been bartered, about two weeks before the homicide, to Turner's cousin, who upon inquiry said that he in turn had traded it to the defendant. The sheriff and several other persons then went to the defendant and asked about the revolver he had obtained from his cousin. He at first denied any knowledge of it, but upon being pressed finally procured a pitchfork, and, leading the party into a grove where it had been buried, dug it up and gave it to the sheriff. The state was permitted to show the fact of finding the revolver and a part of what the defendant had said in the conversation leading up to it. The admission of this evidence is complained of on the ground that it violated the rule against the use of involuntary confessions, and virtually compelled the defendant to be a witness against himself.

In stating the case to the jury one of the attorneys for the prosecution told them that the testimony would show that he had said to the defendant, before the revolver was produced: "I want you to get that gun, and if you don't do it we will have two hundred men here to search every inch of the ground, and you know when we find it what will happen, and no man can stop it." No evidence was offered that such language was in fact used, but the state must be regarded as admitting that the production of the revolver and any-

---

The State v. Turner.

---

thing said about it by the defendant after his talk with this attorney resulted from fear on his part.

The only evidence that was introduced, however, of any statements made by the defendant about this matter related to conversations that took place before any threat had been made. Moreover, there was no error in its introduction for another reason. The statements attributed to the defendant were not of the nature of admissions; they consisted of denials of any knowledge of the revolver; they were exculpatory rather than incriminating, and were not within the rule applicable to confessions. (*The State v. Campbell*, 73 Kan. 688; 1 Wig. Ev. § 821.) One witness testified that at one time the defendant said he knew where the revolver was, but that he immediately retracted the statement.

The contention that evidence of the production of the revolver from its hiding place by the defendant should have been rejected is more serious, but the authorities support the contrary view with substantial unanimity. Some of them go so far as to justify the admission of an extorted confession, so far as it is corroborated by indisputable facts which it discloses. The only substantial difference of opinion relates to the admissibility of the confession itself. The narrow scope of the conflict and the reasoning upon which the courts have proceeded are exhibited by the following typical expressions:

“Where an involuntary confession discloses incriminating evidence which is subsequently on investigation proved to be true, or where the confession leads to the discovery of facts which in themselves are incriminating, so much of the confession as discloses the incriminating evidence and relates directly thereto is admissible. And the facts discovered in consequence of such involuntary confession may be proved. Thus in a prosecution for murder evidence of the discovery in a certain place of the remains or clothing of the deceased or of the weapon by which he was killed, with so much of an involuntary confession as relates directly to such facts, is admissible.” (12 Cyc. 478.)

"A modification of the rule which excludes a confession not shown to be voluntary exists where the information derived in consequence of a confession leads to the discovery of material facts which go to prove the commission of the crime confessed. In that case, so much of the confession as strictly relates to the facts discovered and the facts themselves will be received in testimony, though the confession may be shown to be involuntary, for the reason that the discovery of the facts corroborates the truth of the confession to that extent and excludes the idea of its fabrication under undue influence, though in some jurisdictions it seems that in such case the entire confession is admissible." (6 A. & E. Encycl. of L. 551.)

"If the confession, being inadmissible because improperly procured, brings to light facts or circumstances tending to show guilt, the prosecution is not precluded from proving the facts thus disclosed by other evidence, because they were brought to light by a confession which is itself incompetent. Some cases have gone further and held that not only may the fact disclosed be proved, but that portion of the confession disclosing it. But other cases hold that while the facts may be proved the declaration accompanying it must be excluded." (3 Enc. of Ev. p. 341.)

"The main reason for rejecting confessions uttered under the influence of hope or fear is the great probability that the prisoner has been influenced by his expectation of punishment, or of immunity, to speak what is not true. If, however, the existence of extraneous facts is discovered through the statements of the accused, no reason exists for rejecting those parts of the confession which led to the discovery, and which, though not voluntarily made, have been corroborated convincingly by the facts discovered." (Underhill, Crim. Ev. § 138.)

"The object of all the care which, as we have now seen, is taken to exclude confessions which were not voluntary, is to exclude testimony not probably true. But where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact, is discovered, it is competent to show that such discovery was made con-

---

The State v. Turner.

---

formably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found, but it would not be competent to inquire whether he confessed that he had concealed it there. . . . If the prisoner himself produces the goods stolen, and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter, there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and explanatory of its character and design, though they may amount to a confession of guilt." (1 Greenl. Ev., 16th ed., §§ 231, 232.)

"Although confessions made by threats or promises are not evidence, yet if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony, *e. g.*, where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried, or gives a clue to other evidence which proves the case." (Wharton's Crim. Ev., 8th ed., § 678.)

"Independent facts and evidence, discovered through a confession inadmissible because impelled by hope or fear, are not therefore to be rejected. . . . There is some authority for saying that no part of the confession, or even the fact of its having been made, can be given in evidence to connect the defendant with the thing discovered; on the other hand, there are statutory provisions and perhaps common-law adjudications in some of the states permitting the entire confession to be laid before the jury when thus confirmed. But the better common-law doctrine in authority, and probably in reason, is that when the confession is thus confirmed simply so much of it as led to the finding, and, should the prisoner have been present at the search and finding, his declarations and conduct during



---

The State v. Turner.

---

this period, or his declarations when he surrenders back an article stolen, may be shown to the jury in connection with the thing itself. The finding makes the truth of so much of the confession sufficiently evident." (1 Bishop's New Crim. Proc., 4th ed., § 1242.)

"The fundamental theory upon which confessions become inadmissible is that when made under certain conditions they are untrustworthy as testimonial utterances. . . . If . . . a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded, and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be adopted. This is the theory of confirmation by subsequent facts, which has been in vogue ever since there has been any doctrine about excluding confessions. That theory is that where, in consequence of a confession otherwise inadmissible, *search is made and facts are discovered which confirm it* in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been *nil*, and the confession may be accepted without hesitation.

"This theory has always been accepted, at least in the abstract.

"It was once contended that the impropriety of the inducement to the confession tainted the facts discovered in consequence of it, and that they also, as well as the confession, should remain inadmissible. Such a doctrine needs only to be stated to expose its equal lack of logic, principle and expediency." (1 Wig. Ev. §§ 856, 859.)

So far as concerns the rule that the accused shall not be required to be a witness against himself, evidence extorted from him by intimidation stands upon the same footing as though it had been procured by force, or by any other unfair or illegal method. It has already been decided by this court that articles of which the prosecutor has obtained possession by unlawful means—for instance, by seizure without process—may be introduced in evidence over the objection of a defendant whose rights have been thus violated. (*The State v.*

---

The State v. Turner.

---

*Miller*, 63 Kan. 62.) The rule authorizes the use as evidence, not only of articles taken by force, but also of those which the defendant has been coerced into delivering. The manner of their procurement, however reprehensible, will not prevent their use as evidence so long as the person against whom they are used has not been constrained by the court to produce them. A document that has been taken stealthily from the defendant's desk, or forcibly from his pocket, or that he has surrendered under a threat of personal violence, may be used against him, because its wrongful procurement creates no estoppel, and the story it tells is its own and not that of the defendant. But if he produces it in obedience to an order of the court it is incompetent, because under such circumstances his act is performed in the capacity of a witness and to admit the fruits of it as evidence would be to make use of him as a witness against himself. The distinction is thus discussed in section 2264 of volume 3 of Wigmore on Evidence:

"Documents or chattels obtained from the person's control *without the use of process against him as a witness* are not in the scope of the privilege, and may be used evidentially; for obviously the proof of their identity, or authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility. . . . This distinction has received repeated illustration and almost universal acceptance, in a variety of applications to documents and chattels obtained by search or seizure independent of testimonial process. It would apparently never have suffered any judicial doubt, but for a modern opinion, in which (in spite of a protest by a minority of the court) the seeds of a dangerous heresy were sown. In *Boyd v. United States* an order for production of documents involving self-criminating matter was properly held to be within the privilege, on the principle of par. (1), *supra*; but the opinion of the majority, speaking *obiter*, declared the privilege applicable also to documents obtained by officers' search or seizure, legal or illegal, irrespective of testimonial process. . . . The *obiter* expressions of opinion by the majority

. . . have led a few other courts, since the publication of that case, to adopt its erroneous view and to exclude documents obtained by seizure."

In the supplement the author adds:

"That case, however, . . . in later federal opinions, has in effect been pared down, and for practical purposes repudiated (in respect to the *obiter* statements in the majority opinion, above noted). (5 Wig. Ev. § 2264.)

The cases bearing on the admissibility in evidence of articles wrongfully obtained from the defendant are fully collected in *State v. Fuller*, 34 Mont. 12, and in notes thereto in 9 Ann. Cas. 655, and in 8 L. R. A., n. s., 762, citing an earlier note in 59 L. R. A. 465.

True, in receiving as evidence information unlawfully obtained, a court may seem by judicial sanction to encourage wrongdoing. But such is not the real aspect of the matter. The sole question under investigation in a criminal trial is the guilt or innocence of the defendant. Nothing not pertinent to that subject can be considered. Everything throwing light upon it should be admitted, unless forbidden by some rule of law. Extorted confessions are not excluded as a rebuke to those who have obtained them, but because they are regarded as of doubtful credibility. The provision of section 10 of the bill of rights that in a criminal prosecution "no person shall be a witness against himself" forbids his being compelled to testify, but does not extend so far as to prevent the prosecution from making use at the trial of information obtained from him under duress. The courts do not approve a resort to illegal means to obtain evidence. They are not indifferent to a violation of the letter or spirit of the law designed for the protection of one accused of crime. But a far-reaching miscarriage of justice would result if the public were to be denied the right to use convincing evidence of a defendant's guilt because it had been brought to light through the excessive zeal of an individual,

whether an officer or not, whose misconduct must be deemed his own act and not that of the state.

We think it clear that no error was committed in receiving the evidence complained of. The judgment is affirmed.

---

**'THE GARDEN CITY, GULF & NORTHERN RAILROAD COMPANY, Plaintiff, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SCOTT *et al.*, Defendants.**

No. 16,909.

**SYLLABUS BY THE COURT.**

1. **CONTRACTS—Time of Performance—Substantial Compliance with Conditions—Railroad-aid Bonds—Completion of Road.** In mandamus to compel a board of county commissioners to subscribe for stock in a railroad company and issue bonds in aid of its construction, where the defense relied upon was the failure to complete the road within the time stated in the proposition submitted to the voters, it is *held*, upon the evidence, that the plaintiff company had substantially complied with the terms and conditions of the contract and is entitled to have the subscription made and the bonds issued.
2. **SPECIAL ELECTION—Bonds—Irregularities in Sheriff's Proclamation.** The sheriff's proclamation calling a special election to vote upon a railroad-bond proposition contained in the first publication a number of errors in the preamble of the notice. The notice itself correctly stated the date of the election, as did the notices posted by the sheriff, and the errors in the published notice were corrected in the subsequent publications. *Held*, that the defects were merely formal and not sufficient to render the election void.
3. ——— **Statutory Provision for "Second" Election Does Not Prevent Subsequent Elections.** In section 7027 of the General Statutes of 1909 (Laws 1887, ch. 183, § 1), authorizing the calling of a second election to vote bonds in aid of a railroad upon a petition of a majority of the legal voters, the word "second" means "another," or subsequent, election, and the authority of a county, township or city to hold bond elections is not exhausted upon the holding of a first and a second election.

---

Railroad Co. v. Scott County.

---

Original proceeding in mandamus. Opinion filed June 11, 1910. Peremptory writ allowed.

STATEMENT.

THIS is an original proceeding in mandamus to compel the defendants to subscribe for certain stock of the plaintiff and to issue railroad-aid bonds in exchange therefor. The county clerk is ready and willing to issue the bonds, and has filed a disclaimer. The board of county commissioners has answered to the alternative writ, setting up as a defense that the railroad company failed to comply with the conditions of the contract under which the bonds were voted, and the further defense, with respect to Valley township, that the election there was irregular and void.

The plaintiff is a corporation organized under the laws of the state of Kansas and empowered to build a standard-gauge railroad through Scott and other counties of the state. The bonds which the plaintiff seeks to have issued were voted at a special election in Scott and Valley townships, in Scott county, on the 28th day of December, 1909. The proposition submitted to the voters of Scott township provided that the township would subscribe for stock to the amount of \$2000 per mile, and issue its bonds in exchange therefor, the condition being that the railroad company should build a standard-gauge railroad into Scott township from a point on the south line thereof on a direct line north to Scott City, with a station, stockyards, switch tracks and shipping facilities at Scott City; that the railroad should be built and ready for the operation of engines and cars over the same from a point on the south line of the township to Scott City on or before the 31st day of December, 1909; and also contained the express condition that the railroad company should construct and maintain railroad crossings on each and every section line crossed by the railroad within the limits of Scott township, and that the road should be completed from

Scott City to Garden City on or before December 31, 1909.

It is conceded that the election in Scott township was regular in all respects, and that 106 votes were cast for, and 12 against, the proposition. The returns of the election were duly canvassed, and the only objection to issuing the bonds of Scott township is the alleged noncompliance on the part of the company with the conditions of the contract. It is claimed that on December 31, 1909, the railroad was not completed and did not at the time have facilities for the transaction of railroad business; that the depot at Scott City was not completed and was a building only twelve feet by ten feet in dimensions, open on one side, with no furniture or supplies of any kind, with no agent in charge, and that it was not a depot or station within the meaning of the terms of the contract; that the company had no sidetracks, switch tracks or stockyards in Scott township at the time the contract expired; and also that no road crossings such as the law requires or the contract contemplated had been constructed in Scott township.

The conditions in the Valley township proposition were the same as those in Scott township, but the board, in making the order and calling the election in the former, added the following provisions:

“That the terms and conditions upon which said subscription shall be made and said bonds issued and delivered are as follow: That said railroad company, its successors or assigns, shall build a standard-gauge railroad, . . . with a station, depot, switch tracks, stockyards and shipping facilities; that said railroad shall be built and ready for the operation of engines and cars over the same, by or before the 31st day of December, 1909; and that when the railroad of said railroad company shall be built and completed and shall be in operation, under lease or otherwise, . . . with a station, depot, switch tracks, stockyards and shipping facilities, the said board of county commis-

---

Railroad Co. v. Scott County.

---

sioners shall cause said bonds, with coupons attached as aforesaid, to be issued."

It is claimed by the defendants that on the 31st day of December, 1909, the road was not built or completed through Valley township as contemplated by the petition and order of the board, that no station or depot had been established, no sidetrack and no stockyards built, and that no road crossings such as are required by law and contemplated by the contract had been constructed within the time limited.

Upon the issues of fact a great deal of testimony has been taken, from which it appears that on December 31, 1909, the railroad company had built a standard-gauge railroad from Garden City to Scott City, into and through Valley and Scott townships, and had extended its line into Scott City to within thirty feet of Main street and about half a block from the depot of the Missouri Pacific railway, the main line of which runs from Kansas City to Pueblo, through Scott City. The plaintiff had on that date constructed about 500 feet of "Y" track in Scott City, which has since been extended so it comprises about 1100 feet of track. It had some trouble operating its cars around the curve from Fifth to Main street on December 31, but finally succeeded in passing over that portion of the track with a construction train. The company has since that date maintained a force of men, from twenty to seventy in number, engaged in work on its track and roadbed in Scott and Valley townships.

On December 30, 1909, the first passenger train, consisting of an engine and two coaches and carrying about seventy-five passengers, ran from Garden City to a point inside the limits of Scott City, and to a point more than half way across the same. Since that date the company has operated two trains each day between Garden City and Scott City, and, on the date the testimony was taken, March 23, 1910, in addition to its

---

Railroad Co. v. Scott County.

---

regular trains, had operated one special, two passenger, and three stock, trains.

On December 31, 1909, and since that date, the company has owned and operated three locomotives, two passenger coaches and eleven freight cars on its line between Garden City and Scott City, and in the transaction of its business has also used cars belonging to other railroads. The first freight train operated between the two cities was run on the 28th day of January, 1910, but the passenger trains up to that time furnished freight service. From the time it commenced operations until the testimony was taken the company collected on account of its passenger business from Garden City to Scott City \$2742.32, and during the same time earned on account of freight items \$4227.93, and had handled 142 carloads of freight. The plaintiff had completed a depot in Scott City on December 31, 1909, and had an agent there on that day selling tickets, but the depot was not equipped with furniture or supplies and evidently was not designed as a permanent office of the company, and no agent was kept there afterward. The company, however, has had the use of the Missouri Pacific depot and the services of the Missouri Pacific agent in the sale of tickets and the handling of freight and baggage. It has also had the use of the Missouri Pacific stockyards. Negotiations between the two companies for the use of the Missouri Pacific stockyards and depot were commenced sometime in December, 1909, but were not put into the form of a written contract until January 12, 1910.

The tracks of the plaintiff company and the Missouri Pacific railway were connected January 15, 1910, so that cars may be taken from one road to the other, and at the time the testimony was taken the plaintiff's road was also connected with the A. T. & S. F. railway at Scott City. No agent has been maintained at the depot of the plaintiff company at Scott City, or at Shallow Water, in Scott township, but during the time since



---

Railroad Co. v. Scott County.

---

December 30, 1909, the regular trains of the company have been handled at Scott City from the Missouri Pacific depot, and have also stopped at the depot of the company at Scott City and at Shallow Water for the purpose of taking on or putting off passengers or freight, and no extra charge has been made on account of passengers boarding trains at these points without tickets.

On December 31, 1909, the road crossings in neither township were completed so as to comply with the terms of the contract. The track was laid during the month of December, when the weather was extremely cold and the ground frozen. The first crossings put in were temporary ones and afterward the company proceeded to rebuild them, and at the time the testimony was taken they complied with the requirements of the contracts. One witness testified that the temporary crossings were sufficient for all practical purposes, and that he hauled a load of fifty bushels of cane seed over one in Valley township without any trouble.

In Valley township the road was completed and a depot finished on December 31, 1909. The sidetracks there are 700 feet in length, but were not completed until the 2d day of January, 1910. The stockyards were not completed until sometime in January. There was testimony showing that only a small amount of business is taken on or put off at that station, and that while no agent has been maintained there the men in charge of the train receive and bill all freight received at that point for shipment.

*Albert Hoskinson, Edgar Roberts, and A. M. Harvey,*  
for the plaintiff.

*John S. Dawson, and D. A. Banta,* for the defendants.

The opinion of the court was delivered by

PORTER, J.: From the foregoing statement of facts, about which there is no serious controversy, it is apparent that the plaintiff company has substantially complied with the terms and conditions of its contract. The same question has been frequently before the court, and the principle adopted in the decisions is one which has received the approval of courts everywhere. The principle is well stated in section 851a of volume 2 of the second edition of Elliott on Railroads as follows:

"A condition that the road shall be built for use within a specified time is to be reasonably construed, however, and is generally regarded as complied with when the road is built so as to be in as reasonably fit condition and as safe and convenient for the public use as new roads usually are in similar localities."

The following cases are directly in point: *C. K. & W. Rld. Co. v. Comm'rs of Osage Co.*, 38 Kan. 597; *S. K. & P. Rld. Co. v. Towner*, 41 Kan. 72; *C. K. & W. Rld. Co. v. Makepeace*, 44 Kan. 676; *C. K. & W. Rld. Co. v. Comm'rs of Chase Co.*, 49 Kan. 399, 411; *Pontiac, etc., R. R. Co. v. King*, 68 Mich. 111; *The C., D. & M. R. Co. v. Schewe*, 45 Iowa, 79; *Brokaw et al. v. The Board of Commissioners of Gibson County et al.*, 73 Ind. 543; *Freeman et al. v. Matlock*, 67 Ind. 99; *Hunt v. Upton*, 44 Wash. 124.

The defendants rely largely upon the case of *M. K. & C. Rly. Co. v. Thompson, Mayor, &c.*, 24 Kan. 170. There time was expressly made of the essence of the contract, and the details as to the kind and character of the equipment of the road were expressly stipulated and provided for. The case is distinguished from the cases cited supra, in the opinion in *S. K. & P. Rld. Co. v. Towner*, 41 Kan. 72. In the present case the township might have stipulated for a depot at Scott City of a particular kind and dimensions, but in fact it only stipulated for a station. The word "depot" is not men-

---

Railroad Co. v. Scott County.

---

tioned in the contract. There is no express provision as to the kind or character of the depot which the company agreed to establish in Valley township, and the evidence shows that the one erected is sufficient for all practical purposes. Nor does the contract bind the company to maintain an agent at the depot.

The defendants insist that time is of the essence of the contracts upon which the bonds were voted, and this is true as to some of the conditions named. Wherever the contracts provide that something shall be done by a day named, time is essential. In the proposition submitted to the voters of Scott township the only express provision with regard to time is that "said railroad shall be built and ready for the operation of engines and cars over the same from a point on the south line of Scott township to said Scott City, Kan., on or before the 31st day of December, 1909; . . . that said railroad be completed from Scott City, Kan., to Garden City, Kan., on or before December 31, 1909." It can hardly be seriously claimed that there was not a substantial compliance with these conditions within the time limited. As this court held in *S. K. & P. Rld. Co. v. Towner*, 41 Kan. 72, in order to constitute a substantial compliance with the terms of such a contract the road "need not have been perfect in every respect at the prescribed date for its completion," provided it was "completed and in operation at that date, in such a manner that it might be properly and regularly used for the purpose of transporting freight and passengers." (Syllabus.)

The only express provision with regard to time in the Valley township proposition was "that said railroad shall be built and ready for the operation of engines and cars over the same, by or before the 31st day of December, 1909." Immediately following, this language is used:

"And that when the railroad of said railroad company shall be built and completed and shall be in opera-

---

Railroad Co. v. Scott County.

---

tion, under lease or otherwise, . . . with a station, depot, switch tracks, stockyards and shipping facilities, the said board of county commissioners shall cause said bonds, with coupons attached as aforesaid, to be issued."

There is much force in the argument of the plaintiff that the last provision quoted should be construed as authorizing the completion of the station, depot, switch tracks, stockyards and shipping facilities within a reasonable time after the 31st day of December, provided the road was built and ready for the operation of engines and cars on or before that date.

In determining whether time is of the essence of the contract courts of equity look further into the intention of the parties to ascertain whether in fact they intended performance by the day named to be controlling. (9 Cyc. 606.) The rule appears to be that time will be deemed of the essence of the contract wherever the benefit to accrue from the consideration materially depends upon a strict performance in point of time. (*St. L. & S. F. Rly. Co. v. Rierison*, 38 Kan. 359.) Thus, where time is not expressly made the essence of the contract it may be held to be so intended from the nature of the contract itself. (9 Cyc. 606; *Kirby v. Harrison et al.*, 2 Ohio St. 326.)

It must be apparent that a court of equity would not be justified in holding that time was of the essence of the contract here, in the sense that the plaintiff was required to have every condition on its part fully complied with and the road completed in every particular by December 31, 1909. A railroad in a sense is never completed; it is constantly undergoing changes and alterations in its track and roadbed. This is especially true of a new road, some portions of which must necessarily be constructed at first in a temporary manner, as occasion requires, and afterward be replaced with more permanent material and construction. Thus, in *C. K. & W. Rld. Co. v. Comm'rs of Chase Co.*, 49 Kan.

---

Railroad Co. v. Scott County.

---

399, 411, temporary pile bridges were put in on some portions of the railroad, and later in the same year the company replaced them with iron bridges, but the court held that, notwithstanding the fact that when the first bridges were built the company contemplated putting in a better class of bridges, this did not make the road incomplete as first constructed nor prove that it had failed to meet the requirements of the contract. In the language of the court in *Pontiac, etc., R. R. Co. v. King*, 68 Mich. 111, "it is a matter of common knowledge that much usually remains to be done in completing a railroad track, and in making it safe for regular freight and passenger business, long after the cars have commenced running upon it." (Page 114.) Of course, a colorable compliance, such as laying a temporary track and running an engine and a few cars over it, with the intention to fulfill merely the letter of the contract and procure the issuance of bonds, would not be sufficient, and in such a case the courts will not hesitate to hold that there has not been a substantial compliance. Good faith is required.

There was no demand made for the issuance of the bonds of Scott township until January 31, 1910, at which time the plaintiff had substantially complied with the other conditions of the contract, and its road was equipped "with a station, stockyards, switch tracks and shipping facilities at Scott City." The subsequent completion of the road furnishes conclusive evidence of the good faith with which the plaintiff appears to have attempted to comply with the terms and conditions of its contract, and upon every principle of equity and fair dealing it must be held entitled to its bonds.

In the briefs of the defendants it is urged that the decision of the board of county commissioners to the effect that the conditions precedent to the making of the subscription and issuance of the bonds have not been fulfilled is final and conclusive. In support of this rather startling proposition the cases of the *Board of County*

---

Railroad Co. v. Scott County.

---

*Commissioners of Day County v. State of Kansas*, 19 Okla. 375, and *Commissioners of Knox County, Indiana, v. Aspinwall et al.*, 62 U. S. (21 How.) 539, are cited. The latter case is frequently referred to as authority for the proposition that an innocent purchaser of municipal bonds may rely upon the recitals in the bonds themselves as to the performance of the conditions precedent, but is not authority for any such doctrine as the defendants urge. In the opinion this language was used:

"We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached." (Page 544.)

The other case cited merely holds that a decision of the district court of Day county finding that certain warrants which had been issued by the county commissioners were valid is conclusive and binding upon the county in a suit upon the warrants, as well it might be, since it was the solemn judgment of a court.

There remains the question whether the election in Valley township was void for irregularities. In the first publication of the sheriff's notice the recitals in the preamble contained a number of errors. It gave the 21st day of September as the date when the petition was presented and the order made by the board, and recited that the board ordered that a special election be held on the 26th day of October when it should have recited that the election was ordered for the 28th day of December. The notice itself gave the correct date of the election, and the errors of the preamble were corrected in the subsequent publications. The notice which the sheriff posted also gave the date of the election correctly. The defects were merely formal and not sufficient to render the election void.

Another objection urged is that the election was the seventh one held in Valley township at which propo-

---

School District v. Wilson County.

---

sitions were submitted by the plaintiff company. It appeared that the seven propositions differed materially in the conditions as to the route and other matters. The statute provides for the calling of bond elections to grant aid to railroads upon the petition of two-fifths of the resident taxpayers, and further provides that a second election may be had upon the petition of a majority of the legal voters. The language of the statute is: "Provided further, that a second election for the same purpose shall not be held unless upon a petition of a majority of the legal voters of such county, township or city." (Laws 1887, ch. 183, § 1; Gen. Stat. 1909, § 7027.) The objection is based upon a narrow, technical meaning of the word "second," which evidently means in this statute another, or subsequent, election. Webster's International dictionary gives "another" as one of the meanings of the word. It is urged that municipalities must not be harassed or badgered by the calling of several elections. The answer is that another election can only be called upon the petition of a majority of the legal voters, and where a majority has petitioned for it no injustice can result in holding the election.

The peremptory writ is allowed.

82	806
182	786

---

SCHOOL DISTRICT NO. 32, OF WILSON COUNTY, *Appellant*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WILSON *et al.*, *Appellees*.

No. 16,973.

SYLLABUS BY THE COURT.

1. PRACTICE, DISTRICT COURT—*Judicial Notice—Tax Levy*. A court may take judicial notice of a tax levied by the board of county commissioners of the county in which the court is held upon all the taxable property in the county.
2. MANDAMUS — *Performance of Legal Duty—Discretion of County Commissioners*. Where a legal duty is cast upon a

---

School District v. Wilson County.

---

board of county commissioners that duty may be enforced by mandamus, and such duty can not be evaded upon the ground that the county officials have a discretion to act.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed June 11, 1910. Reversed.

*E. D. Mikesell*, for the appellant.

*F. M. Woodard*, and *W. H. Edmundson*, for the appellees.

The opinion of the court was delivered by

SMITH, J.: The school district filed a petition in the district court of Wilson county, which, omitting the caption, prayer for relief, signatures and verification, reads as follows:

"The plaintiff says that school district No. 32, in said Wilson county, Kansas, now is, and has been for more than thirty-five years last past, a regularly organized school district under and by virtue of the laws of the state of Kansas; that said school district now maintains, and for two years next preceding the 30th day of June, 1909, maintained, a high school offering and providing for two courses of instruction, each requiring four years' work, viz., a college preparatory course which fully prepares those who complete it to enter the freshman class of the college of liberal arts and sciences of the University of Kansas, and a general course designed for those who do not intend to continue school work beyond the high school; that said high school has not been discontinued.

"That there has been, during the year next preceding said 30th day of June, 1909, such high schools maintained in school districts No. 40 and 47, in said Wilson county, Kansas, and said high schools have not been discontinued.

"That A. F. Squires, J. L. Rogers and J. E. Clark have been, since the 11th day of January, 1909, and now are, the duly elected and regularly acting county commissioners of said Wilson county; that Josie E. Park is now, and has been, since the 10th day of May, 1909, the duly elected, qualified and acting county superintendent of said county.



## School District v. Wilson County.

"That at the general election for the year 1906 the following proposition was submitted to the qualified voters of Wilson county, Kansas, viz.: 'May the provisions of the high-school act of 1905 apply in this county?' And at said election a majority of the voters voting on said proposition voted in favor of the same.

"That on or before the 25th day of July, 1909, the said Josie E. Park, as such county superintendent, certified to the county clerk and county treasurer of said county the average daily attendance in the said several high schools in said Wilson county, in compliance with the provisions of chapter 397 of the Laws of 1905, and acts amendatory and supplemental thereto, for the year ending June 30, 1909. Said county superintendent as aforesaid also certified, on or before the 25th day of July, 1909, to the said board of county commissioners the amount of money necessary for the maintenance of such high schools for the ensuing year, which certificate is in words and figures as follows:

"ESTIMATED EXPENSE OF MAINTAINING THE HIGH SCHOOLS			
	<i>Altoona.</i>	<i>Fredonia.</i>	<i>Neodesha.</i>
Superintendent's salary .....	\$450	\$500.00	\$600
Teacher's salary .....	1,665	2,182.00	2,250
Janitor .....	157	150.00	180
Fuel and lights.....	72	67.50	125
Apparatus .....	300	375.00	400
	<u>\$2,644</u>	<u>\$3,274.50</u>	<u>\$3,555</u>

"That the total amount necessary for the support of such high schools of said county, as so certified, amounts to \$9473.50, of which amount this plaintiff is entitled to \$2644.

"That the assessed valuation of the taxable property of Wilson county, Kansas, for the year 1909, is \$29,-680,365; that none of said districts No. 32, 40 or 47 contain more than 16,000 inhabitants; and that no county high school has been established in said Wilson county, Kansas, and none is now mentioned [maintained] therein.

"That said board of county commissioners have at all times failed, neglected and refused to make such levy as is necessary to produce said amount of \$9473.50 for the maintenance of such high schools, although having been demanded so to do; that a levy necessary to produce said sum of \$9473.50 will not exceed five-tenths ( $\frac{5}{10}$ ) of one mill on the dollar of the assessed valuation of the

---

School District v. Wilson County.

---

taxable property in Wilson county, Kansas; that demand was made by this plaintiff on the said Josie E. Park, as county superintendent of said county, to make a suitable levy sufficient to provide said amount of \$9473.50 and certify same to the county clerk of Wilson county, Kansas, but that the said Josie E. Park refused and neglected to make such levy and has ever since so refused and neglected to make same.

"That this plaintiff has no adequate remedy at law for the said refusal and neglect of defendants."

On application to the judge of the court an alternative writ of mandamus, reciting in detail the facts alleged in the petition as having been made to appear, was allowed. The defendants—the board of county commissioners and the county superintendent—jointly filed a motion to quash the writ, for the reason that the petition of the plaintiff does not state facts sufficient to constitute a cause of action. At the ensuing term of court the motion, or demurrer, came on for hearing, and was by the court sustained generally, whereupon the plaintiff elected to stand upon its pleading, and the court dismissed the action.

The plaintiff makes three assignments of error: (1) That the court erred in sustaining the motion to quash and in dismissing the action; (2) that the court erred in taking judicial notice of a fact which did not appear in the pleading—that the board of county commissioners had levied a tax of two-tenths of a mill for the support of the high schools in question; (3) that the court erred in holding that the amount of tax levied by the board of county commissioners was discretionary with the board, notwithstanding the provisions of chapter 397 of the Laws of 1905 (Gen. Stat. 1909, § 7792 *et seq.*) and acts amendatory and supplemental thereto. (Laws 1907, ch. 333, Gen. Stat. 1909, § 7797; Laws 1909, ch. 245, Gen. Stat. 1909, § 9394 *et seq.*)

The defendants contend that as the levying of a tax and determining the amount thereof is a legislative function the acts in question are unconstitutional, in

that they in effect authorize the county superintendent to determine the amount of tax to be levied; that the county superintendent is not a tribunal transacting the county business within the meaning of section 21 of article 2 of the constitution; and that the determination of the amount of tax necessary to support the high schools is discretionary with the board of county commissioners, as in other cases.

The court, in passing upon the motion, said that judicial notice would be taken of the fact that the board of county commissioners did in August, 1909, levy for the high-school fund a tax of two-tenths of one mill on the dollar on all the taxable property in Wilson county, which levy will produce \$5936, of which the plaintiff will be entitled to \$1664 as its portion thereof, and held that, the board having exercised the discretion vested in it by law, this action can not be maintained.

In a matter of such public notoriety and interest as the levying of a tax upon all of the taxable property in the county we think the court did not err in taking judicial notice of the fact.

As to whether that portion of the act authorizing the county superintendent to estimate the amount necessary to be raised by taxation for the support of high schools, and providing that upon the failure of the board of county commissioners to levy a tax to raise such amount the superintendent should make a suitable levy, is constitutional we do not deem it necessary to decide in this case. The commissioners and the superintendent demurred jointly to the petition. By the ordinary rules of pleading, while the court may in its discretion sustain a demurrer as to one defendant and overrule it as to the other, the court should overrule or sustain a joint demurrer according as the petition does or does not state a cause of action against either defendant. We will, then, consider the petition and demurrer as they relate to the board of county commissioners only, for if the

---

School District v. Wilson County.

---

petition stated a cause of action against either defendant it was stated against the board of commissioners.

Section 6 of chapter 397 of the Laws of 1905, as amended by section 1 of chapter 333 of the Laws of 1907 (Gen. Stat. 1909, § 7797), reads as follows:

"It shall be the duty of the county superintendent to certify to the county clerk and to the county treasurer, on or before the 25th day of July of each year, the average daily attendance in the several high schools of the county complying with the provisions of this act for the year ending on the 30th day of June preceding, and to certify to the board of county commissioners the amount necessary for the maintenance of such high schools the ensuing year, and the county commissioners shall make such levy (not to exceed three mills on the dollar of the assessed valuation of the taxable property within such county) as may be necessary to produce such amount; and in case the county commissioners shall fail to make such levy, then the county superintendent shall make a suitable levy, and certify the same to the county clerk of such county, who shall enter upon the tax rolls the levy so made by the county superintendent."

The limitation as to the amount of the assessment was changed by section 15 of chapter 245 of the Laws of 1909 (Gen. Stat. 1909, § 9408) to five-tenths of one mill upon the dollar on all taxable property. The limitation provided in the act of 1909 should be read in lieu of the portion within parentheses in the above section.

The law imposes upon the county superintendent the duty of certifying to the county clerk and to the county treasurer, on or before the 25th day of July of each year, the average daily attendance in the several high schools of the county for the year ending June 30 preceding, and to certify to the board of county commissioners the amount necessary for the maintenance of such high schools for the ensuing year. Thereupon this duty is imposed on the county commissioners: they shall make such a levy, not to exceed five-tenths of a

---

School District v. Wilson County.

---

mill on the dollar of the assessed valuation of the taxable property within the county, as may be necessary to produce such amount.

Other provisions are made in section 5 of chapter 397 of the Laws of 1905 (Gen. Stat. 1909, § 7796) for means by which the county superintendent may acquire the information upon which to base the estimate, which, of course, may be presumed to be in addition to such knowledge as comes to the superintendent in the discharge of his official duties.

By the terms of section 1 of chapter 397 of the Laws of 1905 (Gen. Stat. 1909, § 7792) the act does not apply except to counties in the state in which one or more school districts, or cities of less than 16,000 inhabitants, shall have maintained high schools of the requisite grade.

It thus appears that the county superintendent, in making the estimate of the necessary amount to be raised to support the high schools, may know with practical precision what it has cost to maintain the schools for the year preceding, and that officer is thus probably better prepared to make an estimate of the necessary expenses for the ensuing year than any other officer or officers of the county, not excepting the board of county commissioners. The legislature, probably recognizing this fact, imposed upon the county superintendent the duty of making the estimate and certifying certain facts, and upon the board of county commissioners the duty of levying a tax to raise the amount estimated. A specific duty is by statute imposed upon the county superintendent, and, if the act is valid, as we hold that it is, it imposes a specific duty upon the board of county commissioners, and does not leave that body any discretion in the matter.

The legislative discretion involved in the levying of a tax has in this case been exercised practically by the legislature itself. It has prescribed a very low limit to the rate of taxation, and has prescribed upon what facts

---

Hill v. Johnson County.

---

the commissioners shall act in levying a tax up to such limit. It was said in *Comm'rs of Wyandotte Co. v. Abbott*, 52 Kan. 148, on the authority of numerous cases from this court there cited:

"Where a legal duty is cast upon a board of county commissioners, that duty may be enforced by *mandamus*, and such duty can not be evaded upon the ground that the county officials have a discretion to act." (Page 159.)

(See, also, *Hutchinson v. Leimbach*, 68 Kan. 37, 44.)

We conclude that the court erred in sustaining the demurrer to the petition. The judgment is reversed and the case is remanded, with instructions to proceed in accordance with the views herein expressed.

---

H. A. HILL, *Appellant*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON *et al.*, *Appellees*.

No. 16,985.

SYLLABUS BY THE COURT.

CONSTITUTIONAL LAW—*Delegation of Legislative Powers—Due Process of Law—Taxation—Rock Road Law*. Chapter 201 of the Laws of 1909 "providing for the improvement of country roads," commonly known as the "rock road law," is not unconstitutional on the ground that it delegates legislative power to the petitioners, nor for the reason that the act contains no express provision for notice to the property owners before the special assessments become a tax upon their property, nor because it gives to the board of county commissioners authority to tax one-fourth of the cost of the improvement upon the township through which the road runs.

Appeal from Johnson district court; JABEZ O. RANKIN, judge. Opinion filed June 11, 1910. Affirmed.

A. L. Berger, and S. D. Scott, for the appellant.

Fred S. Jackson, attorney-general, C. B. Little, county attorney, John T. Little, C. W. Gorsuch, and C. L. Randall, for the appellees.

The opinion of the court was delivered by

PORTER, J.: In this case the validity of the "rock road law" is assailed, and the only question is whether the law is constitutional.

The board of county commissioners was about to let a contract for the construction of a public road in Johnson county when the plaintiff, who is a taxpayer in the county, owning land within the taxing district, brought this action to enjoin the proceedings. A temporary restraining order was granted. The defendants answered that they were proceeding under the authority of chapter 201 of the Laws of 1909 (Gen. Stat. 1909, §§ 7359-7369), entitled "An act providing for the improvement of country roads in the state of Kansas," approved March 6, 1909. The answer alleged that under the provisions of the act a petition was presented to the board praying for the improvement of the road; that it contained the names of more than sixty per cent of the landowners along the line of the road owning more than fifty per cent of the land to be taxed, and that it fully complied with all the provisions of the law; that afterward, at a regular meeting of the board, a resolution was adopted finding and declaring the improvement to be of public utility, and declaring that the taxing district for the payment of the improvement should include the lands lying on each side of the road within the distance set out in the petition, and further alleged that the proceedings of the board were in compliance with the provisions of the statute and with full authority. A demurrer to the answer was overruled, and the plaintiff appeals.

The act, which is commonly known as the "rock road law," provides for the improvement of country roads. The first three sections of the act are as follow:

"SECTION 1. Wherever sixty per cent of the landowners along the lines of any regularly laid out road, who shall own at least fifty per cent of the land to be taxed, within such distance as shall be stated in the

---

Hill v. Johnson County.

---

petition hereinafter referred to, or on each side thereof, or within a radius of the distance prescribed in such petition on each side of such road, from any point thereof, and between the terminal points mentioned in such petition, shall petition the board of county commissioners of the county in which such road is located for the improvement of such road, or any part thereof, said county commissioners shall cause said road or part of road thereof to be improved as prayed for in said petition and as hereafter provided; provided, however, that before such improvements as prayed for in such petition are ordered by the county commissioners they shall, by order of the board, find and declare it to be of public utility.

"SEC. 2. Such petition shall state: First, the name of the road which or any part of which is to be improved; second, the points between which said improvements are to be made; third, the kind of improvements prayed for; fourth, the number of annual assessments to be made in payment thereof, not exceeding ten.

"SEC. 3. Upon the filing of such petition the said county board shall cause an accurate survey of such road, or any part thereof, to be made by the county surveyor, or by some surveyor or engineer to be employed by them for that purpose, and a careful estimate of the cost of such improvement, with profile and specifications thereof, together with a map showing the several tracts of land within such distance as shall be stated in the petition, and cause the same to be filed in the office of the county clerk of the county."

Section 4 provides that the county commissioners shall take charge of and conduct the improvement in conformity with the specifications, and authorizes the board to make contracts for the work and to issue special-improvement bonds in payment thereof. There are provisions for letting the contracts to the lowest bidder, and for contractors' bonds for the faithful performance of the work.

Section 6 provides that when the work is completed the county commissioners shall apportion three-fourths of the cost thereof among the several tracts of land designated in the map, according to the benefits accruing to the property, and shall give credit thereon for any



damages occasioned to the property by the construction of the improvement, and that "the remaining one-fourth of such cost shall be charged to the township or townships in which such road improvements are made, which shall be raised in the manner now provided by law for raising taxes for all township purposes."

Section 7 authorizes the commissioners, whenever in their judgment any part of such road is of general importance to the county, or where unusual expense will be incurred by reason of creeks, sand, etc., to make an order that the expense of such portion of the road shall be paid out of the general fund of the county. There is a further provision that the county clerk shall enter the cost of such improvement upon the tax rolls of the county, and that the taxes shall be collected as other taxes.

The main contention is that the act is unconstitutional because it delegates legislative powers to the petitioners, first, to determine absolutely the location, extent and boundaries of the taxing district within which three-fourths of the cost of such improvement is to be raised by special assessments; second, to determine the kind, character, extent and cost of the improvement; third, to determine the time over which the special assessments are to be extended and payments made, and, fourth, to levy one-fourth of the cost of the improvement upon the townships through which the road runs without their consent.

The whole contention is based upon the doctrine of *Comm'rs of Wyandotte Co. v. Abbott*, 52 Kan. 148, where the "Buchan law" was held unconstitutional. That decision, which was by a majority of the court, turned upon the single proposition that the act under consideration provided that when a majority of resident landowners within one-half mile on either side of any regularly laid out road petitioned the board to improve a road, or any part thereof, it was thereby made the duty of the board to cause the improvement to be made.

---

Hill v. Johnson County.

---

Because of the arbitrary provision leaving to the board no discretion or supervisory control, either with respect to whether the improvement should be made or its cost, the act was held to confer legislative power upon the petitioners. It was said in the opinion, however, by way of argument, that if the statute had conferred discretion upon the board to make the improvement it might be upheld. The same principle controlled the decision in *Hutchinson v. Leimbach*, 68 Kan. 37, where an act of the legislature attempting to authorize an individual to effect a change in the boundaries of a city by a petition to the district court was held invalid for the reason that the provisions of the act left no discretion in the council or other public body or office. The doctrine of *Comm'rs of Wyandotte Co. v. Abbott*, supra, is limited by the language used in the opinion to the peculiar provisions of the act there involved. In passing upon the particular proposition which we are now considering it was said:

"If the legislature had conferred upon the board of county commissioners of Wyandotte county discretion to order the improvement, the control thereof, and the amount of expenditure therefor, the statute might be valid. (Const., art. 2, § 21.)" (Page 161.)

During the seventeen years which have passed since the Abbott case was decided there has been a steady and constant growth of sentiment everywhere in favor of the building of "good roads," and of apportioning the cost of their construction between the public and those whose property is specially benefited thereby. This sentiment has gradually crystallized into a popular demand, in response to which the legislature at its last session enacted the "rock road law." It is the duty of the court to uphold the statute unless it is apparent that it conflicts with some provision of the constitution. It is presumed to be valid. In its enactment the legislature evidently sought to avoid the defects in the Buchan law, and doubtless for that reason expressly provided

that before the improvement prayed for should be ordered by the board, and before any tax could be imposed, the board should first make an order finding and declaring the road to be of public utility.

The difference between the two statutes is quite material. The earlier one, which was held to be unconstitutional, left no discretion whatever in the board as to whether the improvement should be made. If the petition was in due form the board was required to order the improvement made and the tax to be levied. Under the provisions of the act of 1909, before any improvement can be made or any tax levied the board must first find and declare the improvement to be of public utility, and must adopt the boundaries of the taxing district suggested by the petitioners. But it has the power and discretion to adopt or reject. If in its judgment the taxing district is not a proper one the board can reject the proposition and refuse to find and declare the improvement to be of public utility. The effect of such action would require a petition to be presented with a taxing district acceptable to the board before any improvement could be made or tax levied. The determining of the kind, character and extent of the cost of the improvement, of the time when special assessments are to be paid, and the finding and declaring the work to be of public utility, are all acts of the board. The law does not delegate to the petitioners the power to order or direct that anything be done. They do not arbitrarily fix or form a taxing district, nor do they arbitrarily determine the kind, character or extent of the improvement or the cost thereof, or the time when the special assessments are to be paid. These are all done by the board. Nothing that the petitioners do can be regarded as the exercise of legislative power. They merely initiate the proceedings. Their petition may be in proper form, may, in every respect, comply with the provisions of the act, but, unless the board in its legislative capacity declares

---

Hill v. Johnson County.

---

that the improvement is of public utility and shall be made, no action is taken toward making the improvement or levying a tax.

This vital distinction between this act and the one involved in the Abbott case answers the objection to the present act based on the ground that it provides for taxing one-fourth of the cost of the improvement to the township through which the road runs. The power to declare what shall be the taxing district is a legislative power, exercised by the board, upon which the legislature may confer legislative powers. Section 21 of article 2 of the constitution provides that the legislature may confer upon tribunals transacting the business of the several counties such powers of local legislation and administration as it shall deem expedient. (*City of Emporia v. Smith*, 42 Kan. 433.) In *Wulf v. Kansas City*, 77 Kan. 358, the court upheld a law providing for the appointment by the mayor, in cities having a population of more than 50,000, of a board of park commissioners with power to issue bonds and levy taxes therefor. In the present case it appears from the answer that the county commissioners expressly adopted the district as defined by the petitioners.

Another objection urged is that the act contains no express provision for notice to the property owners before the special assessment becomes a tax upon the property. A complete answer to this is found in the cases of *Gilmore, County Clerk, v. Hentig*, 33 Kan. 156, and *Railroad Co. v. Abilene*, 78 Kan. 820. Every presumption is in favor of the validity of the statute, and it will not be held void merely because there is no express provision for notice to the property owner and opportunity to be heard if there is nothing in the statute which prevents such notice. In the opinion in *Railroad Co. v. Abilene*, supra, it was said:

"Provision for notice and a hearing need not be made in the statute by express words. It may be implied. In reality the courts simply read the provision

into the statute in order to uphold taxation schemes against the fourteenth amendment to the constitution of the United States, which forbids any state to deprive any person of property without due process of law. This was done in the case of *Gilmore, County Clerk, v. Hentig*, 33 Kan. 156. But the statute must be one which will allow notice and a hearing to be interpolated. If it arbitrarily fixes the steps to be taken in a manner indicating that notice and a hearing upon some subject like benefits are excluded, it must be judged accordingly." (Page 827.)

There is nothing in the act in our opinion which conflicts with the various provisions of the statutes for raising taxes for township purposes. Attention is called to the fact that section 1 of chapter 256 of the Laws of 1909 (Gen. Stat. 1909, § 9423) provides that township boards shall fix the levy and rate of taxation for township purposes, but shall not levy a tax to exceed three-fourths of one mill for township purposes. It is contended that this necessarily conflicts with section 6 of the present act, which provides that one-fourth of the cost of rock roads may be paid by the township, and "shall be raised in the manner now provided by law for raising taxes for all township purposes." This provision refers to the method of raising the tax for one-fourth of the cost of the improvement, and does not make the tax thus levied a tax for township purposes. It is in the nature of a general tax, and is not special in the sense that it is charged against specific property.

We conclude that the law is not invalid for any of the reasons suggested, and the judgment of the district court is therefore affirmed.

JENNIE M. SCHMIDT, *Plaintiff*, v. JAMES M. NATION, *as Auditor, etc., et al., Defendants.*

No. 17,104.

SYLLABUS BY THE COURT.

1. SCHOOL LAND—*Assignment of Certificate of Purchase—Improvements—Patent.* Where a purchaser of school land sells his right to the land and the improvements to another, and assigns his certificate and gives possession to such other, the assignee becomes the owner of the improvements; and when he has completed the purchase under the certificate by full payment of the purchase price he is entitled to a patent.
2. ——— *Improvements—Ownership.* In such a case the state does not become the owner of the improvements, and a sale of the land for the appraised value thereof separate from the improvements is proper.
3. ——— *Patent—Duty of State Auditor.* In such a case the assignee of the certificate, who has paid the state the purchase price of the land in full, is entitled to a patent, and it is the duty of the state auditor upon demand to make the proper certificate for such patent.

Original proceeding in mandamus. Opinion filed June 11, 1910. Writ allowed.

*Lee Monroe, W. S. Roark, and George A. Kline*, for the plaintiff.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, and *Charles D. Shukers*, special assistant attorney-general, for the defendants.

The opinion of the court was delivered by

GRAVES, J.: This is an original action in this court by Mrs. Jennie M. Schmidt to obtain a writ of mandamus compelling the state auditor to make the proper indorsements upon a certificate of sale of school land to enable her to obtain a patent to the land. It appears that the land in controversy consists of 320 acres and is situated in Gove county. One quarter section was settled upon by Judson J. Bigbee, in 1887,

and the other by Elma L. Stansbury, in 1899. They resided upon and improved the land until July, 1901, when they sold their improvements and rights as settlers to one John Rundberg, who assigned the certificates to the petitioner, Jennie M. Schmidt.

After the purchase by Rundberg the land, upon the application of twenty householders, was offered for sale, and was purchased by Rundberg for \$3 an acre. The land and improvements were appraised separately—the land at \$3 an acre, the improvements upon one tract at \$370, and those upon the other at \$169.50. As Rundberg had purchased the improvements from the owners, certificates of purchase were issued to him for the appraised value of the land alone. After the plaintiff came into possession of the land she paid for one of the tracts in full, but when the certificate, with final payment indorsed thereon, was sent to the state auditor he refused to certify it for a patent, upon the ground that the state was entitled to the value of the improvements upon that tract, amounting to \$169.50. The plaintiff also made a tender of the full purchase price of the other tract to the county treasurer of Gove county, which was refused on account of the action of the auditor as to the tract for which payment had been made.

The improvements were originally the property of the settlers who made them. The state had no interest in such improvements, and claimed none. While these improvements were in the possession and ownership of the settlers who made them, a *bona fide* sale thereof was made to Rundberg; thereafter they were his property. He sold them to the plaintiff. No steps have been taken by the state to cause the improvements to be forfeited or confiscated to the state's use or benefit. We have not been cited to any statutory provision which provides for such a forfeiture. The only policy adopted by the state in relation to the disposition of improvements upon school land where the land is trans-

ferred by assignment of the certificate of purchase is indicated by the provisions of the statute existing upon this subject when the rights now under consideration accrued. In a case where a purchaser by reason of failure to comply with his contract forfeits his right to purchase the land, the improvements naturally revert to the state as a part of the land. Where a settler erects improvements and afterward becomes a purchaser of the land, the state expressly relinquishes to him whatever right it may be supposed to have to the improvements as an encouragement to permanent occupancy. (Laws 1876, ch. 122, art. 14, § 6; Gen. Stat. 1901, § 6346.) Where the purchaser has no right to the improvements, the state requires him to pay for them. (Gen. Stat. 1901, § 6346.) If the improvements were owned by the settler or other person and do not pass to a subsequent purchaser under the provisions of the statute, then if the improvements have been appraised separately their value belongs to the owner thereof. (Laws 1876, ch. 122, art. 14, § 20; Gen. Stat. 1901, § 6360.) But in the case here presented the purchaser has already paid the owner for the improvements. She stands in this respect in the same attitude as if she were the original settler and had made the improvements. It would be an unusual proceeding at least for the state to require this settler to purchase her own improvements as a prerequisite to perfecting her title to the land, the purchase price of which has been fully paid. This is not in harmony with the liberal policy practiced by the state in the disposal of its school land. The state has never manifested, either in the statutory procedure for the disposal of school land or in the practice thereunder, a disposition to extort property from settlers in this manner. If it were intended to be any part of the plan for the disposal of these lands to make the sale of improvements a material feature, some provision would probably have been made by which the title to the land and the



---

Hunt v. Allen County.

---

improvements could be kept separate, so purchasers could know, when they were buying school land, who owned the improvements.

The plaintiff purchased the land from the owner in good faith and upon the reasonable belief that he had a good right to convey both the land and the improvements. He had a certificate of purchase issued by the state, and now, after the plaintiff has paid to the state all that it is entitled to under the contract evidenced by this certificate, and has received a final receipt for full payment for the land, to compel her to pay again for that which she has already bought seems like an act of injustice and extortion. No statute should be held to provide for or justify such a transaction unless its language is so clear and unequivocal as to render a different interpretation unreasonable. Our attention has not been called to any statute that can by reasonable interpretation be said to convey such a meaning.

We think the plaintiff is entitled to her patent without paying for the improvements again, and the auditor should make the necessary certificate to enable her to obtain the patent. The writ is therefore allowed as prayed for.

---

LEIGH HUNT, *Appellant*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ALLEN *et al.*, *Appellees*.

No. 16,526.

SYLLABUS BY THE COURT.

1. **TAXATION — Stock of Corporation — Resident Owner.** The resident owner of shares of stock in a corporation which is organized in another state and has its principal office in such state, and not in the state of Kansas, is required by the statutes of this state to list such shares for taxation at the full value thereof, and is not entitled to any deduction from the assessment thereof although all, or practically all, of the cap-

---

Hunt v. Allen County.

---

ital of such corporation is invested in real estate and personal property which is taxed in this state.

2. ——— *Double Taxation—Validity of Statute.* Such taxation of such shares of stock is not double taxation, and the statutes authorizing the same are not void as in conflict with section 1 of article 11 of the constitution of the state of Kansas, but are valid.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed May 7, 1910. Affirmed. Rehearing denied June 17, 1910.

*Altes H. Campbell*, and *John F. Goshorn*, for the appellant; *John J. Jones*, and *Zeigler & Dana*, of counsel.

*H. A. Ewing*, *S. A. Gard*, and *G. R. Gard*, for the appellees.

The opinion of the court was delivered by

SMITH, J.: It is agreed that "the question here presented is, May a resident owner of shares in a foreign corporation which has complied with the corporation laws of this state be lawfully taxed thereon, where all of its property is situated and taxed and the tax thereon paid in this state, its property so taxed exceeding in value the value of all its outstanding shares, and where all or practically all of its shareholders are also residents of this state?"

The plaintiff, Hunt, filed a petition in the district court of Allen county in which it is virtually conceded he stated facts sufficient to entitle him to recover judgment against the defendants for nearly \$1000, if the above question be answered in the negative. The defendants jointly demurred to the petition on the ground that the facts stated did not entitle the plaintiff to recover. The demurrer was sustained by the court, and, the plaintiff electing to stand upon his pleading, judgment was rendered against him for costs. He appeals.

This question must be answered by the statutes of the state. Section 9214 of the General Statutes of 1909 (Laws 1876, ch. 34, § 1) provides "that all property in

this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act." That the capital stock of the corporation in question is personal property is determined generally and specifically by the following excerpt from section 9215 of the General Statutes of 1909 (Laws 1907, ch. 408, § 1) :

"The term 'personal property' shall include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also the capital stock, undivided profits and all other assets of every company, incorporated or unincorporated, and every share or interest in such stock, profit, or assets, by whatever name the same may be designated, provided the same is not included in other personal property subject to taxation or listed as the property of individuals."

It is not contended that this capital stock is exempt from taxation, or that the capital stock of any corporation for profit is directly exempt by any provision of the statute. It is, however, contended that to maintain "a uniform and equal rate of assessment and taxation" (Const. art. 11, § 1), the provisions of section 9229 of the General Statutes of 1909 (Laws 1908, ch. 80, § 1), which apply only to corporations having their principal office within the state, should in some way be applied to the capital stock of a corporation having its principal office outside of the state but owned by citizens and residents of the state. The provision of section 9229 necessary to elucidate the contention is as follows :

"That no person shall be required to include in the list of personal property any portion of the capital stock of any company or corporation which is required to be listed by such company or corporation; but all incorporated companies, except such companies and corporations as are specially provided for by statute, shall be required to list by their designated agent in the township or state [city] where the principal office of said company is kept, the full amount of stock paid in and remaining as capital stock, at its true value in money, and such stock shall be taxed as other personal property; provided, that such amount of stock of such com-

---

Hunt v. Allen County.

---

panies as may be invested in real or personal property which, at the time of listing said capital stock, shall be particularly specified and given to the assessors for taxation, shall be deducted from the amount of said capital stock."

It is true that under the provisions of this section the capital stock of a corporation having its principal office in this state practically escapes taxation to the extent that the same is invested in real estate or in personal property. But it is also true that under the provisions of the statute the owner of shares of stock in a corporation which does not have its principal office in the state is required to list the same for taxation at its full value; and there is no provision for deducting from the amount of such value any sum proportionate to the amount which the corporation has invested in real estate or personal property in the state as compared with the entire capital stock thereof. This results in an inequality of taxation. Where a company has its principal office in this state the stockholder is not directly assessed or taxed on his stock. The corporation lists its entire capital stock and is allowed a deduction from the value thereof in the amount of the value of the real and personal property in which the stock is invested and which is taxed. The stockholder inferentially pays his proportion of the taxes levied against his stock indirectly by a reduction of the dividends, while the owner of stock in a corporation which does not have its general office in this state is required personally to list, and is taxed upon the full value of, his shares of capital stock, and is required to pay the tax directly.

The plaintiff listed and was taxed on the full value of his shares of stock in a corporation organized under the laws of West Virginia, in which state was its general office. The capital of the corporation was invested almost entirely in real estate and personal property in Kansas, and its property in this state was taxed at a greater value than the amount of its capital stock. The plaintiff denied liability to pay any taxes upon his

shares, and tendered payment of taxes on his other property, which, being refused, he paid the entire tax and brought this action to recover the amount which he claims was illegally levied against him.

It must be conceded that he paid more taxes than would have been required of him if the corporation had had its principal office in this state and had listed its property and been taxed according to the statutes of the state. While the result is unequal, he has not been subjected to double taxation. The corporation, as a person, was assessed and paid its taxes in accordance with the laws of the state. It did not own the shares of stock assessed to the plaintiff, but he owned the same independently and separately, and they were directly assessed and taxed to him under the provisions of the statute. (Gray's Lim. Tax. Power, § 1374; 27 A. & E. Encycl. of L. 949; 1 Desty, Tax. p. 353; *Wright v. Louisville & Nashville R. R. Co.*, 195 U. S. 219; *Greenleaf v. Board of Review*, 184 Ill. 226.)

It is apparent that it would be very impracticable, if not impossible, to adapt the method provided by statute for listing and taxing shares in corporations having general offices in the state to the listing and taxing of shares in corporations not so situated. The inequality in this case grows out of the different method provided by the statute for listing and assessing shares in the two kinds of corporations. Of necessity the legislature has adopted several different methods for the assessment of property of different classes and used in different kinds of business. The same rate of taxation was levied upon the plaintiff's property, and the same method of assessment was applied thereto, as is applied to the property of all other citizens similarly situated. So far no Solon has appeared in this or any other state of the Union who could devise a method, or any number of methods, of assessment and taxation for all the various kinds of property which would result in equal taxation in every individual

---

*In re* Washington.

---

case. As has been said, if absolute equality of taxation is required, there can be no taxation.

The petition at least fails to allege that the corporation had its general office within this state and that it thus became the duty of the corporation to return its capital stock, including the plaintiff's shares, for taxation. Therefore the petition is demurrable.

The judgment is affirmed.

---

*In the Matter of the Disbarment of W. B. WASHINGTON.*

No. 16,811.

**ATTORNEYS—Disbarment.** The evidence and findings held to authorize and require the revocation of the license of the accused to practice law in this state.

Original proceeding in disbarment. Opinion filed June 11, 1910. Attorney's license revoked.

**STATEMENT.**

**CHARGES** were presented against W. B. Washington, an attorney of the bar of this court. In substance it is charged (1) that he wrongfully altered a return upon an execution then upon the files of the district court; (2) that in an action of foreclosure he wrongfully assumed to represent a party which had not appeared nor authorized anyone to appear for it in the action, and obtained an order of the court for the payment of a sum of money to himself as attorney for such corporation, without its knowledge or consent, and never paid or attempted to pay it over, but applied it to his own use; (3) that he fraudulently altered the terms of a promissory note held by him, by inserting therein a stipulation relating to interest after it had been de-

---

*In re Washington.*

---

livered to him; (4) that, while acting as trustee of a fund placed in his hands by two persons, he refused to pay it over to the one entitled to it according to the terms of the trust agreement, and wrongfully required that a sum of money claimed by his son against the person so entitled should be first paid; (5) that he wrongfully added the words "and interest" to the verification of an account in his hands for collection, without the knowledge or consent of the affiant thereto, in order to compel the debtor to pay interest not claimed by the creditor; (6) that, acting with his son as a partner in business as real-estate agents, he caused a conveyance to be made to his son of a title which he had been employed to secure for his client, and refused to permit the son to convey it to the client unless his demand for a much larger sum than had been agreed upon for his services, and much larger than they were worth, was paid; (7) that he obtained from a client a note and mortgage for \$525 to use in procuring an assignment to a third party and extension of the time of payment of a judgment against this client, which he had obtained as attorney for the judgment creditor, and that he did not apply it to the purpose for which it was given, but wrongfully claimed it as his own; (8) that, being a man of violent and turbulent disposition, he has threatened the lives of others, and is a quarrelsome and dangerous man.

An answer was filed, and a commissioner was appointed to hear and report upon the issues so made. The evidence taken and the findings of the commissioner thereon are now presented for judgment.

The evidence on the part of the complainants, who are citizens of the district wherein the accused resides, tends to support the charges. The evidence on the part of the accused tends to disprove part of the charges, and is explanatory of his conduct in the matters specified in others. The findings of the commissioner upon the several specifications are in substance:

---

*In re Washington.*

---

(1) That real estate having been sold by a coroner upon execution for \$250; the accused made out the return for the officer, stating that the sale had been made for \$171.70. Some time afterward an abstracter in searching the records discovered a discrepancy between this return and the recital in the coroner's deed which stated that the sale had been made for \$250, and, being called upon for an explanation, the accused went to the office of the clerk of the district court and altered the return then remaining on file so as to show that the sale had been made for \$250, by interlineation and by writing over the words previously written, but that this was done openly and without fraudulent intent.

(2) That in a foreclosure action wherein he was attorney for the plaintiff the accused presented to the court and procured the allowance of an order of confirmation, wherein he had inserted a clause directing the payment to him, as attorney for the Nichols & Shepard Co., the sum of \$139.89 out of the proceeds of the foreclosure sale, "to be paid on second mortgage." That corporation did hold a second mortgage on the property, but had not sought or obtained any judgment or order in the action, nor appeared therein, nor authorized the accused to do so, and had no knowledge of his having done so. He did not pay the money over to the corporation or make any effort to do so, but placed it in the hands of a friend. On the trial of this proceeding, about five years after he had received it, he paid it over to an attorney for the Nichols & Shepard Co., upon demand therefor, claiming that he had forgotten about it.

(3) That the charge relating to the alteration of the interest clause in promissory notes was not sustained.

(4) That W. B. Washington and his son, H. W. Washington, had been associated in business as real-estate agents at the law office of the former at Leoti until H. W. Washington went to Colorado, expecting to remain. One Chapman asked him to return to Leoti to



*In re Washington.*

assist in a real-estate deal. This he did, and the trade, with his assistance, was made between Chapman and one Burkert, and a written contract stating its terms was prepared by the accused for them. Pursuant to the terms of the contract each party placed in the hands of W. B. Washington \$200, to be held by him until its terms were complied with. To this sum \$300 was afterward added. The amount, \$700, was deposited by him in the bank, in a special account. The contract was carried out, when H. W. Washington and Chapman, who by the terms of the agreement was entitled to the fund, differed about the compensation the former was to receive for his services, whereupon W. B. Washington refused to turn over the fund to Chapman until the claim of his son for \$700 was settled, saying that this was done that his son might not be compelled to sue for his pay. Thereupon Chapman and the son agreed that the latter should be paid \$350, and W. B. Washington drew out the \$700 and paid Chapman \$350 and H. W. Washington \$350. The value of the property disposed of by Chapman was over \$8000.

(5) That the accused had a claim for collection against a Leoti merchant. The claim was mailed from St. Louis on October 30. On October 31 the debtor mailed his check to the creditor for the amount claimed. The check, however, was not paid until November 21, and the creditor urged the accused to collect the claim, and, on January 4 following, sent him a duly itemized and verified statement of the account, with instructions to sue. A demand was made for the money, and the debtor, without saying that he had sent the check, refused to have anything to do with the accused concerning it. Thereupon the accused sued upon the account, filing the itemized statement in court, but before doing so added an item of \$12 for interest, and inserted in the affidavit verifying the account the words "and interest," after the statement therein of the balance due,

---

*In re Washington.*

---

which alteration was made without authority, but without fraudulent intent. The debtor defended the action and recovered costs.

(6) That the accused was employed to look up a title for a client and procure a quitclaim deed for certain land. His son was at that time dealing on his individual account in town lots, and subsequently obtained a deed from the claimant of the lot which the accused had been employed to secure for his client, but he had no interest in the title so acquired by his son and no knowledge of the fact that the son had attempted to obtain, or had obtained, it until after it was done.

(7) The accused, as attorney for one Meisenheimer, obtained a judgment against one Cutler for over \$1300. Cutler requested him to obtain from Meisenheimer extensions of time to pay the judgment, and extensions were accordingly obtained from time to time. It was agreed between Cutler, Meisenheimer and the accused that Cutler should pay to the accused the fee due him from Meisenheimer in obtaining the judgment. After several extensions had been made the accused informed Cutler that one Bassett would buy the judgment, and would be more lenient in its enforcement, and he procured for Cutler an assignment of the judgment to Bassett. About that time he settled with Cutler for his services and expenses, and took a note therefor for \$525, payable to the order of Bassett. Bassett then refused to accept the assignment of the judgment, and thereupon assigned the note without recourse to the accused and returned the assignment of the judgment to Meisenheimer. Cutler was informed of the failure to sell either the note or the judgment to Bassett. The note was not paid when due, and a new note for \$557, to the order of W. B. Washington, secured by a bill of sale of an elevator, was given in its place, and the mortgage securing the first note was released. These papers were placed in the hands of one Christy, and

---

*In re Washington.*

---

while in such custody Cutler commenced an action in the district court against the accused and Christy for their cancellation, on the ground that they had been obtained by fraud. Issues were joined in the case, and upon trial a special verdict was rendered in favor of Cutler and judgment was rendered upon the verdict and findings of the court for cancellation as prayed for. The question submitted to the jury and determined in that action was whether the note for \$525 was executed under the circumstances and for the consideration claimed by Cutler or under the circumstances and for the consideration claimed by Washington, and the answer was that the transaction was as claimed by Cutler. The claim of Cutler was in substance that the note was given to procure an assignment of the judgment by Meisenheimer to Bassett and an extension of time thereon in the circumstances about as set out in the sixth charge made herein; that the note had not been applied to that purpose; that there was no other consideration for the note; and that it was not given in consideration of services, as claimed by the accused.

(8) That the accused is a man of quick temper, which he sometimes fails to control, and has had much trouble at different times with one of the relators, and also with the marshal of Leoti and with some others; that at times and probably when under the influence of intoxicating liquor he was very abusive and threatening in conduct and language; that he has bitter enemies, among whom is the relator referred to; that he had a quarrel with the city marshal over a dog fight, during which he displayed a pocketknife and the marshal a revolver, and that a crowd was attracted and much excitement ensued, after which the belligerents made up; that the respondent's most serious trouble has been with the relator before referred to, who was mayor of Leoti, the relator having made a practice of carrying a revolver and menacing the accused, who has

---

*In re Washington.*

---

on two or three occasions made threats against the relator and has used language concerning him which for vileness and indecency is beyond the imagination of the ordinary individual, and wholly unjustifiable, and when under the influence of drink has also used very improper language regarding others with whom he was having trouble.

The commissioner concluded that the right of the respondent to practice law should be suspended for three months, and that he should pay one-half of the costs of the proceeding and the relators should pay the other half. In his opinion the commissioner said:

"I have some doubt as to the correctness of the conclusions of law; but fortunately that matter will be finally determined by the combined judgment of the seven judges of this court and does not rest upon the judgment of your commissioner. Each of the attorneys for the prosecution in the oral argument took occasion to disavow any personal feeling in this matter, and each stated in substance that he had known Mr. Washington for many years; that his conduct in court had always been unexceptionable and his treatment of the members of the bar had been universally that of a gentleman, . . . and, however justifiable this prosecution may have been, it was evident to me that it was prosecuted with malice and a spirit of revenge, and, in my judgment, it would not conduce to the public welfare that either party should boast of an unqualified victory; nor would it do for the court to ignore, or by implication sanction, the conduct of Mr. Washington. His alteration of the record in the office of the clerk of the district court was reprehensible, although not done with fraudulent intent. No attorney should alter a record of the court without an express order from the court or judge, and such order should be reduced to writing and made a part of the records of the court. The conduct of Mr. Washington in receiving the \$139.89, as specified in the second charge, seems inexcusable in the first instance, and his failure to discover the parties to whom the money belonged and properly account for it within a reasonable time increases his misconduct in connection with the matter. His personal conduct, as disclosed by the testimony introduced

---

*In re Washington.*

---

under the eighth charge, should be condemned by all right-thinking men. I do not believe that the bar of Kansas requires that any example should be made for their benefit or that the profession will be disgraced by association with Mr. Washington. The evidence in this case shows that his conduct and practices have been below the average standard, and yet, in my opinion, the punishment of disbarment is too severe for the offenses by him committed, and a suspension of his right to practice for a limited time and the division of the costs will come nearer promoting exact justice."

*D. A. Banta, J. S. Simmons, and R. D. Armstrong,*  
for the accusers.

*M. B. Nicholson, Lee Monroe, and George A. Kline,*  
for the accused.

*Per Curiam:* The alteration of the return of an officer after it is duly filed in the clerk's office, without any order or sanction of the court, is so dangerous to the rights of the parties and so perilous to public records that comment upon it seems hardly necessary. The practice of applying for and obtaining an order for an amendment to be made by an officer, where an amendment is proper, is so usual that it must have been well known to the accused. The records of a court would be of little value if subject to alteration without leave by attorneys, who, because of the confidence reposed in them as officers of the court, have opportunities to do so. That the alteration in this instance was made without fraudulent intent palliates, but does not justify, the act.

The manner in which the \$139.89 was obtained and its retention for over five years without even an effort to pay it over to the party in whose name it had been claimed are alike reprehensible. That party had not appeared in the action, nor in any manner authorized the accused to claim or receive money in its behalf. It was a surplus fund remaining after the satisfaction of a judgment, and if the court had been informed of the true facts a proper order would have been made for its

disposition, but not the one that was prepared and presented to the court by the accused.

The findings exonerate the accused from the third charge, and also from the sixth. With respect to the latter it seems unfortunate that the son, whose office appears to have been with the father, and with whom the father's name had been associated in the real-estate business, purchased and held adversely a title which the father as an attorney had been employed to procure for a client. Although this was done innocently and without the father's knowledge, the outward circumstances were such that the complainants probably were mistaken as to the real nature of the transaction when they made the charge.

The reason given by the accused for not paying over a trust fund in accordance with the agreement upon which he held it until his son's claim was first paid, namely, that he wished to save his son from a lawsuit, although it may appeal to parental feelings, was not a sufficient excuse for a trustee for others. So far as the findings show, the son's claim was just, but the father had not been appointed to judge of that matter, and the trust agreement made no provision for its payment.

The addition of the item of interest in the account, and the insertion of the words "and interest" in the affidavit verifying it, referred to in the fifth finding, unlike the alteration of the coroner's return, were done before the bill of particulars to which it was attached had been filed. The gravamen of the charge consists in the fact that the verification was affected by the addition. The affiant had not sworn to the correctness of any claim for interest, but the added words made it appear that he had done so. The account, therefore, as filed, so far at least as the item of interest is concerned, was not a verified account, but as it was made to appear so the plaintiff in that action might have obtained an advantage to which he was not entitled. (Jus. Civ. Code, § 84.) While no injury resulted in

the particular case, such a practice can not be approved.

In considering the eighth finding, upon the charge of offensive language and quarrelsome conduct, the following quotation from an opinion of this court seems pertinent:

"True it is that a man is required to show upon his admission to the bar that he is of good moral character. His license to practice after he is admitted, however, will not be revoked on account of objectionable personal habits until it is shown that such habits have rendered him unable to attend properly to his duties as a lawyer, or have rendered him unworthy of the great trust and confidence generally accorded to the members of the profession, or that such habits have become so bad as to scandalize his profession or the courts in which he practices." (*In re Elliott*, 73 Kan. 151, 157.)

In the opinion of the commissioner the language and conduct referred to were provoked, in part at least, by that of two of the complainants. It is quite true that the speech and conduct of a man must be viewed in the light of any provocation given by others, and of all the attendant circumstances. Still, the complainants were not on trial. Their conduct, except so far as it explains the conduct of the person charged, or affects their own credibility, is not very important now in this case, if sufficient cause existed to warrant the proceeding. That a lawyer should use language which the commissioner reports is so regrettable a fact that we refer to it only because duty requires it, and an omission might be thoughtlessly construed as an indication of indifference on the part of the court.

It will be observed that the finding of the district court, upon the trial of the action between Cutler and Washington for the cancellation of securities, was contrary to that of the commissioner's finding upon the seventh charge. In view of the findings, however, upon other charges, which are amply supported by the evi-

---

*In re Washington.*

---

dence, it is not deemed necessary to review the evidence relating to that one.

We quite agree with the commissioner that an example is not required for the benefit of the legal profession, for happily offenses of the nature specified in these charges are rare indeed, and the bar has, as it fully deserves, the confidence of the people; yet in order that this confidence may continue unabated, and because the due administration of justice requires it, courts will not hesitate to apply sufficient correctives whenever willful violation of duty is shown. (*In re Norris*, 60 Kan. 649; *In re Smith*, 73 Kan. 743.)

"If the accused has been shown to be guilty of such misconduct that the public should be protected from the implied recommendation for integrity with which he is armed as a member of the bar, that recommendation should be withdrawn and he should be disbarred." (*In re Elliott*, 73 Kan. 151, 159.)

The care and patience of the commissioner called to perform an unpleasant duty, and the kindly manner in which it was performed, merit our grateful approval, but the penalty recommended seems to the court insufficient, and as there was good cause for the proceeding no costs should be imposed upon the complainants.

Believing that the evidence and the facts reported authorize and require it, the judgment of the court is that the license of the accused to practice law in this state be revoked, and that he pay the costs.



---

Gambill v. Bowen.

---

ANDREW J. GAMBILL, *Appellee*, v. WILLIAM P. BOWEN,  
*Appellant*.

No. 16,403.

**PLEADINGS—*Demurrer—Practicability of Guarding Machinery—Factory Act—Injury to Employee.*** In an action under the section of the factory act (Gen. Stat. 1909, § 4679) requiring certain machinery to be guarded where practicable, an allegation that it was the defendant's duty to guard the cogwheels by which the plaintiff was injured held to imply that such guarding was practicable, no motion having been filed to make the pleading more definite in that regard.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed June 11, 1910. Affirmed.

*O. P. Ergenbright*, and *T. H. Stanford*. for the appellant; *Stanford & Stanford*, of counsel.

*C. J. Bryant*, for the appellee; *Ziegler & Dana*, of counsel.

*Per Curiam*: The plaintiff recovered a judgment in an action based upon the section of the factory act (Laws 1903, ch. 356, § 4; Gen. Stat. 1909, § 4679) requiring cog gearing in manufacturing establishments to be safely guarded wherever practicable. On appeal the defendant maintains that the petition failed to state a cause of action under the statute because it contained no allegation that it was practicable to guard the machinery upon which the plaintiff was injured. The petition did allege "that it was the duty of the said defendant . . . to have all of the aforesaid . . . cogwheels . . . properly and safely guarded." This was a sufficient averment that such guarding was practicable, at least in the absence of a motion to make the pleading more definite in this respect.

The plaintiff's testimony tended to show that he

---

Farington v. Modern Woodmen.

---

would not have been injured if he had exercised ordinary care, but whether that fact was conclusively established need not be determined, in view of the decision by this court in another case that contributory negligence constitutes no defense to an action brought under the factory act. (*Caspat v. Lewin*, ante, p. 604.)

The judgment is affirmed.

---

MARY A. FARINGTON, *Appellee*, v. THE MODERN WOODMEN OF AMERICA, *Appellant*.

No. 16,436.

**DEATH—Proof—Seven Years' Unexplained Absence.** In an action by the beneficiary of a member of a fraternal-insurance order who had disappeared and had not been heard from for more than seven years a judgment for the plaintiff was affirmed.

Appeal from Cherokee district court; CORB A. MCNEILL, judge. Opinion filed June 11, 1910. Affirmed.

*Truman Plantz, George G. Perrin, and S. C. Westcott*, for the appellant.

*Edward E. Sapp, and Don H. Elleman*, for the appellee.

*Per Curiam:* This action was brought to recover upon a beneficiary certificate issued by Camp 804, Modern Woodmen of America, at Galena, Kan., to Ivan E. Farington, a member of that camp and son of the beneficiary, Mary A. Farington, the plaintiff. To enable the plaintiff to recover it was necessary for her to establish the death of Ivan E. Farington. The plaintiff claims that her son disappeared from his home December 1, 1899, and has not been heard from since that date. Such an unexplained absence for more than

---

Karner v. Railroad Company.

---

seven years creates a presumption from which death may be inferred. (*Modern Woodmen v. Gerdorn*, 72 Kan. 391.) The trial in the district court was to a jury, which upon the evidence submitted found a verdict in favor of the plaintiff.

It is claimed that the testimony presented does not show that the search made to find Ivan E. Farington was sufficient to satisfy the law upon this subject as decided by this court in the cases of *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 77 Kan. 401, *Renard v. Bennett*, 76 Kan. 848, and other decisions. We have carefully examined the evidence, however, and think it fully complies with the rule announced by this court in the cases mentioned. The criticism made to the admission of evidence is not justifiable. The newspaper clippings and affidavits objected to were proper evidence for the purpose offered. They tended to show what diligence had been taken to find Ivan E. Farington or to explain his absence, and this was a material question in the case.

Being unable to find any error, the judgment of the district court is affirmed.

---

LUDWIG J. KARNER, *Appellant*, v. THE KANSAS CITY  
ELEVATED RAILROAD COMPANY, *Appellee*.

No. 16,576.

1. PRACTICE, DISTRICT COURT—*Admonition to Jury—Duty to Agree*. An admonition to the jury presenting to them in strong language their duty to agree if possible held not to constitute error.
2. ——— *Same*. An oral admonition to the jury, after their deliberations had begun, directing their attention to the instructions regarding the burden of proof and adding, "when you can not decide a matter in favor of the party who has the affirmative, because the weight of the evidence is not that way,

---

Karner v. Railroad Company.

---

you should decide the other way," held not to be reversible error.

3. **JURY AND JURORS — Misconduct — Consideration of Matters Not in Evidence.** Where the speed of a street car was in issue, the fact that one member of the jury told the others during their deliberations that he was a railroad man and knew within what distance a train could be stopped when running at a certain speed, and used that fact in arguing against the plaintiff's right to recover, held not to be ground for reversal.

Appeal from Wyandotte court of common pleas;  
LEWIS C. TRUE, judge. Opinion filed June 11, 1910.  
Affirmed.

*Edward C. Little*, for the appellant.

*O. L. Miller, W. J. Buchan, and C. A. Miller*, for the appellee; *Samuel Maher*, of counsel.

*Per Curiam*: The plaintiff sued a street-railway company on account of injuries received in a collision, alleging negligence in running at too high a rate of speed. Contributory negligence was relied on as a ground of defense. A verdict was returned for the defendant, and the plaintiff appeals. When the jury had been out a short time the court called them in and urged upon them the desirability of their reaching an agreement. Soon afterward he gave them the same admonition in stronger terms, saying, among other things:

"I think you have failed to read your instructions as much as you should have read them, and learn from them that when you can not decide a matter in favor of the party who has the affirmative, because the weight of the evidence is not that way, you should decide the other way. . . . You can see the necessity for your making some strenuous effort to come to an agreement upon that doctrine that when a party has the affirmative of an issue, if the evidence does not show that party is entitled to recover you must find the other way; find against that party."

It is contended that this language was likely to be,

---

Karner v. Railroad Company.

---

and in fact was, understood by the jury to mean that if as a body they could not agree that the plaintiff had shown a right to recover, then it was the duty of all to unite in a verdict for the defendant. We do not think the words of the court were fairly open to that construction or that it is probable they were so interpreted. They seem intended merely to emphasize the principle that it is the duty of a juror to find against the party having the affirmative of an issue, unless in his judgment the contention of such party in that respect is supported by a preponderance of the evidence. The occasion for such emphasis does not appear, but as the burden of proof rested upon the plaintiff as to the defendant's negligence, and upon the defendant as to that of the plaintiff, the court may have thought there was likelihood of a misapprehension and so directed especial attention to the written instructions in that regard. A juror made affidavit that he was misled by the language of the court, but of course it was not competent for him to impeach the verdict in this manner.

The court went quite far in seeking to impress upon the jury their duty to agree if possible, but not so far as to constitute coercion or otherwise amount to reversible error. Complaint is made that the first admonition to the jury was given in the absence of, and without notice to, the plaintiff or his attorney. His attorney was present when the language most strongly objected to was used, and his absence on the prior occasion could not have resulted in material prejudice to his client.

A further ground upon which a reversal is asked is that during the deliberation of the jury one of its members told the others "that he had been a railroad man and knew how long it took to stop an engine and train, and how far a train would run in stopping when running at a certain speed, and advanced that fact in his argument to the other jurors as an argument against the plaintiff's right to recover." Just what bearing the

statements of the juror had upon the controverted facts is not shown. Possibly he argued the speed of the street car from the distance within which it was stopped, in the light of his experiences as to the time taken to stop railroad trains. His personal knowledge was not so closely related to the subject under consideration as to justify us in saying that the plaintiff suffered substantial prejudice from its communication to the jury.

Error is also assigned in the giving and refusing of instructions, but the charge as a whole seems fairly to have covered the law of the case, so far as the record discloses.

The judgment is affirmed.

SMITH, J. (dissenting): The journal entry of the proceedings in this case, after the jury first retired to consider their verdict, is as follows:

"And thereafter, and after the jury had deliberated on their verdict in this cause for several hours, the court on its own motion called the jury into the jury box, and this in absence of counsel for plaintiff, and delivered to them orally the following lecture, or admonition: 'Well, you haven't tried enough; you are to follow the weight of the evidence. We want verdicts from juries, not disagreements and two or three days' more work. Jurors, like courts, must try hard to get the work along. There isn't any good reason in most cases for jurors disagreeing. They should be guided by the weight of the evidence, and I think you will have to stay. Please retire again.' Plaintiff's counsel, not being present, had no opportunity to except.

"Thereupon the jury, under the instruction of the court, retired in charge of the sworn bailiff to consider of their verdict.

"Thereafter, and within about an hour's time, the court again called the jury from their deliberation and delivered orally to them the following further lecture, or admonition: 'Sometimes the court has an unpleasant duty to perform, but I trust that I am willing to perform my duty whether it is pleasant or unpleasant.

---

Karner v. Railroad Company.

---

I don't think you have a difficult case to decide. I think you have failed to read your instructions as much as you should have read them, and learn from them that when you can not decide a matter in favor of the party who has the affirmative, because the weight of the evidence is not that way, you should decide the other way. There is hardly ever a good excuse for a jury disagreeing. You don't comprehend how much loss it is to the public service, and how much injury to the administration of justice. You sit here a day or two and hear a case, and the court's time is taken and the public expense is incurred, and if you will just go out a few hours and say, "Oh, well, we don't care to agree," why can't another jury do the same thing, and another jury do the same thing, and the court be trying and retrying the same cases, and new cases piling up here? You can see the necessity for your making some strenuous effort to come to an agreement upon that doctrine that when a party has the affirmative of an issue, if the evidence does not show that party is entitled to recover you must find the other way; find against that party. That is not hard to understand. And it is too much loss to the public service to send a jury out a couple of hours or three hours, and then say, "Oh, well, we don't want to agree and we are discharged." Now, I can not discharge you, that is not doing our duty; but I don't care to keep you out there at night when the balance of us go home and quit. If it is any use to let you go out a half hour longer I will do so, and I will wait for you; if not, I will release you until morning and hold you. I want juries, like courts, to make their work fruitful. What do you say about wanting another half hour right now? Leave it to the majority now to return to the jury room now or in the morning.'

"Mr. Fischer: 'We want an exception to the remarks of the court.'

"And thereupon the jury in this cause were directed by the court to retire and consider further of their verdict. Thereupon the jury retired to their jury room, and within ten minutes thereafter they again returned to the court room and announced by their foreman that they had reached a verdict, which verdict was, by the court, ordered read by the clerk of the court, and which verdict is in words and figures following, to wit: 'We,

---

Karner v. Railroad Company.

---

the jury, find the issues joined herein in favor of the defendant, the Kansas City Elevated Railway Company, and against the plaintiff, Ludwig J. Karner.—J. E. STOTLER, *Foreman*.'

"Thereafter the court made the following order: 'It is therefore by the court considered, ordered and adjudged that the defendant do have and recover of and from the plaintiff the costs of this action, taxed at \$75.80.

"And thereafter, and within the time allowed by law, and on the first day of May, 1908, the plaintiff herein filed his motion for a new trial of this cause."

As to the time the jury were out before they were called in the second time to be orally instructed the affidavit of Judge Fischer, one of the attorneys for the plaintiff, states that it was a little more than half a day, and two jurors, Crandall and Bodington, testified that it was at least half a day. The following statement is in the affidavit of each of the two jurors:

"Affiant further remembers that the court gave certain additional instructions to the jury orally, after the jury had deliberated at least half a day; that affiant understood said instructions to mean that if he was unable to get the jurors to agree with him in favor of the plaintiff, it was his duty to agree with them in favor of the defendant; that said additional instructions were not written out and given to the jury, and affiant and the other jurors were obliged to rely upon their recollection as to them; that but for the said additional instructions of the court the affiant would have considered it his duty to stand by his convictions in said case, which were favorable to the plaintiff, and would not have agreed to a verdict for the defendant."

It is said that the so-called lecture to the jury, if applied to the duty of each individual jurymen, is not essentially erroneous. The portion most strongly criticized is as follows:

"I think you have failed to read your instructions as much as you should have read them, and learn from them that when you can not decide a matter in favor of the party who has the affirmative, because the weight



---

Karner v. Railroad Company.

---

of the evidence is not that way, you should decide the other way."

This could not apply to the conclusion to be reached by the individual juror. It applied to the whole jury—to the deciding of the case. One jurymen could not decide. The circumstances indicated that the individual jurors had made up their minds and had disagreed. They had been out for at least half a day, and were then called in and urged to come to an agreement; were sent out again, and remained about an hour; were again called in, and then a stronger injunction to agree was urged upon them. There is no reasonable interpretation to be given to this injunction except that if the jury as a whole were unable to agree in favor of the party upon whom rested the burden of proof (which as to the right of recovery was upon the plaintiff) then it was the duty of the whole jury to decide in favor of the other party. Two jurors swear in effect that their judgment was that the plaintiff had established his case, but, after listening to this last lecture, they concluded that it was their duty to agree with the majority, and did so and returned a verdict.

It may be said, and perhaps correctly, that these affidavits are incompetent. If so, they are not needed. The fact remains undisputed that the jury went out and returned within ten minutes, which is evidently as short a time as the verdict could be filled out and signed. There was practically no deliberation after the jury were sent out the third time; but they responded to what they interpreted to be, and what was in fact, the one purpose of the lecture—that the minority should surrender their views to the majority.

Since the majority of the electors elect the members of the legislature, and a majority of each house of the legislature passes the law in that branch, and, if the court which hears a case is composed of more than one judge, a majority of the judges interpret the law, the

---

Stiles v. Valley Township.

---

writer thinks that the law might well be that some majority of a jury, in a civil action at least, should decide questions of fact. But so long as it is the law that a verdict of a jury must be the result of the unanimous decision of twelve men, I think it is error for the judge of the court to coerce, or practically to instruct that if they can not unanimously decide either way it is the duty of the minority to yield their convictions and agree to a verdict.

I think the judgment should be reversed and a new trial ordered.

---

S. G. STILES, *Appellant*, v. VALLEY TOWNSHIP *et al.*,  
*Appellees*.

No. 16,584.

1. EVIDENCE—*Demurrer—Weight and Credibility*. The rule that in considering a demurrer to the evidence the court may not reconcile conflicting testimony or determine the weight of the evidence applied.
2. HIGHWAYS—*Defective Culvert—Notice to Township Trustee*. Whether a township trustee had notice of defects in a culvert was a question of fact.

Appeal from Miami district court; WILLIAM H. SHELDON, judge. Opinion filed June 11, 1910. Reversed.

S. J. Shively, for the appellant.

L. S. Harvey, and E. J. Sheldon, for the appellees.

*Per Curiam*: This was the second trial of this case in the court below, and is its second appearance in this court. (*Valley Township v. Stiles*, 77 Kan. 557.) The appellant, who was the plaintiff below, in his petition stated a cause of action, and he was the principal wit-

---

Stiles v. Valley Township.

---

ness in his own behalf. The principal fact in controversy was whether or not the appellant had given notice to the township trustee of the defect in a culvert a reasonable time before the injury complained of to require remedying of the defect in the culvert. The question turned upon whether or not the appellant, in the conversation which he is admitted to have had with the trustee prior to the injury complained of indicated the particular culvert—there being several in the locality—in which the defect is said to have existed.

In his evidence the appellant testified in effect that he had indicated the particular culvert with reasonable certainty; but on cross-examination his attention was called to his testimony on the former trial, it was read to him, and he was asked if he did not so testify, to wit: that the defective culvert was east of Willow Branch schoolhouse; whereas he now claimed he had said it was west of Willow Branch schoolhouse. He admitted that he had so testified on the former trial, but repeatedly reasserted that he had said to the trustee that the defective culvert was west of the schoolhouse. His attention on the cross-examination was repeatedly called to his former testimony, and he apparently became considerably confused; but at no time retracted, but repeatedly reasserted, the statement that he had stated to the trustee that the defective culvert was west of the schoolhouse. Evidence of such notice was essential to sustain his cause of action. The trustee was called as a witness and admitted the conversation with the appellant at the time and place specified by the latter before the accident, but testified that he understood the appellant to refer to a bridge south of the schoolhouse. Upon the appellant's resting his case, the appellees demurred to his testimony. The demurrer was sustained, and judgment rendered against the appellant for costs.

Construed most favorably to the appellant, the evidence established proper notice to the township trustee.

---

Cloud v. Railway Co.

---

It is not for the court to reconcile conflicting evidence or to determine the weight of evidence in the consideration of a demurrer thereto. It is for the jury to determine the weight of the evidence, its credibility, and what it proves.

The judgment is therefore reversed and the case is remanded, with instructions to grant a new trial.

---

CLARA M. CLOUD, *Appellee*, v. THE ATCHISON, TOPEKA  
& SANTA FE RAILWAY COMPANY, *Appellant*.

No. 16,609.

**PERSONAL INJURIES—Proof of Negligence—Employee Injured in the Line of Duty—Assumption of Risk.** In an action for the death of an engineer, who was killed by being struck by the girder of a bridge while leaning out of the cab window and looking for a signal from the conductor of the train, a judgment for the plaintiff was affirmed.

Appeal from Lyon district court; **FREDERICK A. MECKEL**, judge. Opinion filed June 11, 1910. Affirmed.

*William R. Smith, O. J. Wood, Alfred A. Scott, and William Osmond*, for the appellant.

*L. B. Kellogg, W. L. Huggins, and C. M. Kellogg*, for the appellee.

*Per Curiam:* This action was brought by the widow of Thomas Cloud to recover damages from the railway company for the injury and death of her husband, caused by the negligence of the railway company. It is alleged that while serving as engineer and leaning out of a moving locomotive to obtain a signal from the rear of the train his head collided with a girder of a narrow bridge and he was killed. She recovered a judg-

---

Cloud v. Railway Co.

---

ment against the company, and it is insisted that a demurrer to the evidence should have been sustained. We think the evidence is sufficient to sustain the verdict and judgment. It shows that the bridge was narrow and that the track had been laid too close to the upright part of the bridge. It was built when a single track was used, and since the double tracks were laid a locomotive of the size of the one on which Cloud was riding when he was killed came within about twenty-three inches of the upright part of the bridge when the locomotive was erect and standing still. When moving rapidly the locomotive tipped and swayed from side to side, so that it came within a few inches of the girder of the bridge. There is a station about 500 feet west of the bridge, and as the train approached, at the rate of thirty miles an hour, Cloud whistled to the conductor for a signal. The conductor directed the brakeman to give him the "high sign." That signal was given to the head brakeman, and he in turn passed it on to the engineer, who was leaning out of the cab looking for it. Two blasts of the whistle were sounded, indicating that he had received it. About that time he was knocked down and killed. The jury found that the company was negligent in constructing the track too close to the sides of the bridge for the safety of engineers who took signals as Cloud had to do at that place; also in using so large an engine on that track, and in not keeping the track approaching the bridge in proper repair.

There is proof enough that there was negligence in placing the track so close to the girders of the bridge, where it was necessary for the engineer to lean out in order to get signals.

Although no one saw the girders of the bridge strike Cloud's head, the testimony justifies the inference that he was taking the signal in the line of duty at the time he was struck. The fireman saw him leaning out, holding to the whistle rope and looking back for a sig-

---

The State v. Radford.

---

nal, and heard the whistles, and in a few moments looked again and saw the injured engineer lying in the bottom of the cab. Taking account of the distance from the whistling board to the bridge, the rate of speed the train was moving and the time required to transmit the signals it may be fairly inferred that he was receiving the signals when he reached the bridge and collided with it.

It is said that he assumed the risk of the danger. Different types and sizes of engines are used on the railroad. Some tilt and sway more than others. In view of the difficulty in determining the distance between swaying locomotives and the side of the bridge, and of all the other facts in the case, it can not be held that there was an assumption of risk. (*St. L., Ft. S. & W. Rld. Co. v. Irvin*, 37 Kan. 701; *A. T. & S. F. Rld. Co. v. Rowan*, 55 Kan. 270; *Railway Co. v. Michaels*, 57 Kan. 474; *Hoffmeier v. Railroad Co.*, 68 Kan. 831; *Smith v. Railway Co.*, ante, p. 136.)

We find nothing substantial in the objections to the instructions, nor in the other objections that have been made.

The judgment is affirmed.

---

THE STATE OF KANSAS, *Appellant*, v. JOHN W. RADFORD, *Appellee*.

No. 17,106.

**EMBEZZLEMENT—State Officer—Statutory Construction—“Estate” Erroneously Used for “State.”** In the statute (Gen. Stat. 1909, § 2578) forbidding the embezzling by an officer of the state of money “belonging to . . . such . . . estate,” the word “estate” is manifestly intended for “state,” and must be so construed.

Appeal from Wyandotte court of common pleas; HUGH J. SMITH, judge. Opinion filed June 17, 1910. Reversed.

82	853
p82	863

---

The State v. Radford.

---

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, *Charles D. Shukers*, special assistant attorney-general, and *Joseph Taggart*, county attorney, for the appellant.

*John A. Hale*, and *Richard J. Higgins*, for the appellee.

*Per Curiam*: The state appeals from an order of the trial court quashing an information under a statute reading, so far as here important, as follows:

"Any agent . . . of any private person, or of any copartnership . . . or any executor or administrator of any estate, or the guardian of the property of any minor, habitual drunkard, or person of unsound mind, or any officer, clerk, agent, employee or servant of any corporation, joint-stock association or other association . . . or any officer of this state or any county, township, city, board of education or school district or road district therein, or any receiver appointed by any court or judge in this state, who shall embezzle or convert to his own use . . . any money . . . belonging to any such person, copartnership, association, corporation, joint-stock association, estate, minor, habitual drunkard, person of unsound mind, *estate*, county, city, board of education, township or school district, or road district, or the beneficiary of such trust fund, or being a part of the funds, assets or property of such receivership, which shall have come into his possession or under his care by virtue of such employment, office or trust, shall upon conviction thereof be punished in the manner prescribed by law for stealing property of the kind or value of the articles so embezzled." (Laws 1899, ch. 139, § 1; Gen. Stat. 1909, § 2578.)

The defendant was charged with embezzling funds belonging to the state that came into his possession by virtue of his being an officer of the state. His contention is that the statute does not cover such an offense by a state officer, because in enumerating the owners whose property is subject to embezzlement as there defined it fails to mention the state. The word "estate"

---

The State v. Radford.

---

italicized in the foregoing excerpt from the statute is manifestly intended for "state," and must be so construed.

"Where it is manifest upon the face of an act that an error has been made in the use of words, the court may correct the error and read the statute as corrected, in order to give effect to the obvious intention of the legislature." (26 A. & E. Encycl. of L. 655.)

The intention of the legislature is so obvious as to make extended discussion unnecessary, but among other grounds for being certain that "estate" is a clerical error for "state" may be mentioned these: The word "estate" in this connection appears for the first time in the statute as amended in 1899, in a list of owners which was otherwise unchanged, except by making additions thereto. The evident purpose of the amendment was to increase, not to diminish, the capacities in which embezzlement could be committed. There was no intention of exempting state officers from its operation, or they would not have been expressly named as subject to the provisions. That being clear, if all reference to the state as the owner of embezzled property had been omitted, the omission could be treated as inadvertent, and remedied by interpretation. (*Abernathy v. Mitchell*, 113 Ga. 127.) The word occurs in what is substantially a second enumeration in the same section of the persons whose property is to be protected by it. An omission in the second enumeration can be supplied by reference to the first. (*Lan-drum v. Flannigan*, 60 Kan. 436.) The immediate context—the word being grouped with "county, city," etc.—shows that "state" and not "estate" was intended.

The word "estate" had already been used in the same enumeration in its natural place, in association with minors and persons of unsound mind, and there could not have been an intention to repeat it, such repetition, unless aided by interpretation, being without meaning.

The judgment is reversed, with directions to deny the motion to quash.



## APPENDIX.

MEMORANDUM DECISIONS.

---

THE STATE OF KANSAS, *Appellee*, v. C. C. SCOTT,  
*Appellant*.

No. 16,727.

Appeal from Cowley district court; CARROLL L. SWARTS, judge. Opinion filed March 12, 1910. Affirmed.

*C. T. Atkinson*, for the appellant.

*Fred S. Jackson*, attorney-general, *Ed J. Fleming*, county attorney, and *C. S. Beekman*, assistant county attorney, for the appellee.

*Per Curiam*: There were two defendants and the verdict was guilty as to both. The court set aside the verdict as to one of the defendants and the errors which could only have affected him need not be considered. There is nothing substantial in either of the contentions of the appellant. The appellant made no request for any instructions and the instructions given correctly stated the law. Two witnesses swore that the appellant sold them whisky at different times and that they paid him for it. The jury who heard the testimony and saw the witnesses believed them. The trial court, with the same opportunity of passing upon their credibility, approved the verdict. No reason is suggested why we should disbelieve the witnesses.

The judgment is affirmed.

---

L. B. MAYNARD, *Appellant*, v. J. T. WALTHALL *et al.*,  
*Appellees*.

No. 16,266.

Appeal from Miami district court; WINFIELD H. SHELDON, judge. Opinion filed April 9, 1910. Reversed.

*Frank M. Sheridan*, for the appellant.

*E. J. Sheldon*, and *S. J. Shively*, for the appellees.

---

Memorandum Decisions.

---

*Per Curiam:* The facts in this case and the points for decision are substantially similar to those in *Remington v. Walthall*, ante, p. 234, and following the ruling in that case the judgment in this case is reversed and the cause remanded for further proceedings.

---

THE ÆTNA BUILDING AND LOAN ASSOCIATION, *Appellant*, v. MARY J. HOBSON, as *Administratrix*, etc., et al., *Appellees*.

No. 16,457.

Appeal from Kingman district court; PRESTON B. GILLET, judge. Opinion filed April 9, 1910. Affirmed.

*J. H. Connaughton*, and *A. B. Quinton*, for the appellant.

*S. D. LaFuze*, and *George L. Hay*, for the appellees.

*Per Curiam:* The action was properly instituted in the district court, because the title to land was in controversy, a subject which falls outside the scope of probate jurisdiction; but the petition was demurrable because the deed pleaded shows title was taken by Ira E. Hobson as trustee for Pauline and Helen Hobson. (*Loan Co. v. Essex*, 66 Kan. 100, and cases cited in the opinion.) There is no difficulty in harmonizing the various parts of the deed.

The judgment is affirmed.

---

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RAWLINS, *Appellee*, v. F. H. SMITH et al., *Appellants*.

No. 16,486.

Appeal from Rawlins district court; WILLIAM H. PRATT, judge. Opinion filed April 9, 1910. Reversed.

*J. L. Travers*, and *H. McCaslin*, for the appellants.

*J. P. Noblè*, for the appellee.

*Per Curiam:* The journal entry of the judgment sought to be opened shows the applicants were parties to the suit, were served by publication, and that property claimed by them was affected. The evidence in opposition to the application shows

Memorandum Decisions.

---

the case was dismissed as to other lots, and shows conveyance of other lots, but does not contradict the journal entry. Therefore the action of the district court was against the evidence. Besides this, the applicants should have been allowed to introduce their additional evidence. The cause had not been so irrevocably sealed that the immediate offer of more proof, and quite conclusive proof, of just what the court desired to know, was bad.

The judgment is reversed.

---

JONAS ALSTRUM *et ux.*, Appellants, v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellee.

No. 16,502.

Appeal from Clay district court; SAM KIMBLE, judge. Opinion filed April 9, 1910. Affirmed.

C. Vincent Jones, and W. B. Leslie, for the appellants.  
M. A. Low, and Paul E. Walker, for the appellee.

*Per Curiam:* There is no evidence that the deceased was on the track in a helpless condition. It is mere speculation and conjecture that he fell in a fit on the track. There is no evidence that he was on the track long enough for the engineer to stop the train before reaching him. Consequently the cause of action stated in the petition was not proved, and the demurrer to the evidence was rightfully sustained.

The judgment is affirmed.

---

THE STATE OF KANSAS, Appellee, v. S. B. S. WILSON, Appellant.

No. 16,762.

Appeal from Johnson district court; JABEZ O. RANKIN, judge. Opinion filed April 9, 1910. Affirmed.

S. J. Shively, for the appellant.

Fred S. Jackson, attorney-general, and C. B. Little, county attorney, for the appellee; C. W. Gorsuch, and H. L. Burgess, of counsel.

*Per Curiam:* This case might properly be dismissed for the reason that the alleged transcript of the record is not so certified

---

Memorandum Decisions.

---

as to show that it is a true copy of the record. Assuming, however, that it is a true transcript, we have examined it as to all the errors assigned, and do not find any substantial or prejudicial error in the proceedings of the court.

The judgment is therefore affirmed.

---

M. G. HOPPER, *Appellant*, v. WILMER M. LEARNED,  
*Appellee*.

No. 16,520.

Appeal from Stafford district court; JERMAIN W. BRINCKERHOFF, judge. Opinion filed May 7, 1910. Affirmed.

*Ray H. Beals*, for the appellant.

*Robert Garvin*, for the appellee.

*Per Curiam*: The appellant asks to have the judgment reversed upon the sole ground that the verdict was against the weight of the evidence. The action grew out of a horse trade, and the evidence was conflicting. The verdict is supported by competent and substantial testimony, and was approved by the trial court, and the judgment is therefore affirmed.

---

SUSIE A. STARR, *Appellant*, v. A. W. MAUPIN *et al.*,  
*Appellees*.

No. 16,523.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed May 7, 1910. Affirmed.

*J. S. Ensminger*, and *J. R. McNary*, for the appellant.

*D. H. Branaman*, for the appellees.

*Per Curiam*: Giving to the evidence the strongest interpretation of which it is susceptible in the plaintiff's favor, it is legally insufficient to establish want of legal capacity. This being true the action was barred by the statute of limitations. Likewise the charges of fraud and undue influence were not proved. Part of the rejected evidence was improper and the remainder was sufficiently covered by other questions and answers.

The judgment is affirmed.

---

Memorandum Decisions.

---

JAMES WALL, *Appellee*, v. C. H. CULP, *Appellant*.

No. 16,808.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed May 7, 1910. Motion for restraining order denied.

A. B. Quinton, for the appellant.

Z. T. Hazen, for the appellee.

*Per Curiam*: The application for a restraining order was not made until the second case had been tried in the city court and before it had reached the district court. It may be assumed that the district court will refuse to proceed with the trial of the second case until the first case involving the same question is determined in the supreme court. Until it appears the district court is ignoring the appeal and is proceeding to a trial of the second case a restraining order should not be granted.

---

DAVID S. HENEKS *et al.*, *Appellees*, v. J. G. YOUNG *et ux.*, *Appellants*.

No. 16,890.

Appeal from Jackson district court; MARSHALL GEPHART, judge. Opinion filed June 11, 1910. Affirmed.

S. M. Strawn, and Charles Hayden, for the appellants.

M. A. Bender, and Crane & Woodburn Brothers, for the appellees.

*Per Curiam*: Action on the covenants of warranty in a deed executed by J. G. and Sarah A. Young to David S. and Joseph Heneks. After the conveyance it was determined in a judicial proceeding that there was an adverse outstanding interest in the land in the father of J. G. Young. In this action the Heneks recovered what they paid for the outstanding title, and the costs and expenses incurred in maintaining their title. Fifty-eight exceptions to rulings on the admission of testimony and on instructions are presented, none of which is of much consequence. The objections to the rulings on testimony are not substantial. Some of them may not have been technically correct, but in view of the character of the testimony and the form of the objections it can be said that none of them affords grounds for reversal.

---

Memorandum Decisions.

---

It is argued that testimony of the amount paid to attorneys should not have been received because there was no evidence of the value of their services, but that was not the ground of the objection presented. Only a general objection was made. The character of the litigation and the nature and extent of the legal services were before the court, and these afforded some basis for determining the value of the services, and judging from these the attorney's fees paid were very moderate and reasonable. (*Noftzger v. Moffett*, 63 Kan. 354.)

The instructions of the court fairly covered the issues presented in the case, and no material error is found in either the giving or refusing of instructions.

The judgment is affirmed.

---

**CLYDE L. DAY *et al.*, Appellants, v. THE KANSAS CITY PIPE LINE COMPANY, Appellees.**

No. 16,420.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed June 11, 1910. Reversed.

*H. P. Farrelly*, and *T. R. Evans*, for the appellants.  
*John J. Jones*, and *Eugene Mackey*, for the appellee.

*Per Curiam*: This is an action to cancel an oil-and-gas lease. It is claimed that the action can not be maintained for the reason that the plaintiff has an adequate remedy at law. The facts are sufficiently similar to the *Howerton* case to make it controlling here. This case is therefore reversed upon the authority of *Howerton v. Gas Co.*, decided upon rehearing, ante, p. 367.

---

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant, v. JOHN SPAETH, as County Treasurer, etc., et al., Appellees.**

No. 16,540.

Appeal from Wyandotte district court; EDWARD L. FISCHER, judge. Opinion filed June 11, 1910. Affirmed.

*William R. Smith*, *C. Angevine*, and *Alfred A. Scott*, for the appellant.

*Richard Higgins*, city counsellor, *William Winship*, city attorney, and *T. A. Pollock*, for the appellees.

Memorandum Decisions.

---

*Per Curiam:* This is an action to enjoin a special assessment for the construction of a sewer in the city of Argentine. The action is barred by the limitation imposed by section 130 of chapter 122 of the Laws of 1903 (Gen. Stat. 1909, § 994), and is ruled by the decision of this court in *Kansas City v. McGrew*, 78 Kan. 335. (See, also, *Railroad Co. v. Kansas City*, 73 Kan. 571.)

The judgment of the district court is affirmed.

---

C. G. WHEELAND *et al.*, Appellees, v. THE FREDONIA  
GAS COMPANY, Appellant.

No. 16,590.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed June 11, 1910. Affirmed in part; reversed in part.

J. T. Cooper, and John J. Jones, for the appellant;  
Jones & Reid, of counsel.

P. C. Young, for the appellees.

*Per Curiam:* In this case strong reasons against instant forfeiture appear. A fair measure of damages was proved, and indeed was practically conceded on the argument. So far as the judgment relates to the forty acres confirmed to the lessee, it is affirmed. So far as it relates to the remainder of the tract the judgment is reversed, on the authority of *Howerton v. Gas Co.*, ante, p. 367.

---

THE STATE OF KANSAS, Appellee, v. EDWARD VOGHT,  
Appellant.

No. 16,882.

Appeal from Sedgwick district court; THOMAS C. WILSON, judge. Opinion filed June 11, 1910. Affirmed.

John W. Adams, George W. Adams, and Harry T. Dedrick, for the appellant.

Fred S. Jackson, attorney-general, W. A. Ayres, county attorney, and George McGill, assistant county attorney, for the appellee.

*Per Curiam:* The court has read the abstract and brief of the appellant and finds no assignment of error which requires the publication of a formal opinion respecting it. Page after

## Memorandum Decisions.

page of the brief is given to the discussion of alleged errors in the refusal to permit questions to be answered, when the matter sought to be elicited was subsequently divulged in full. Other subjects much pressed had no relevancy to the case on trial. Collateral facts were investigated as far as the rights of the defendant required and the law permitted. Cross-examination was not unduly restricted, and the discretion to permit leading questions was not abused. The expert testimony was unexceptionable in every respect. The instructions given covered the case sufficiently by correct statements of the law. A completed offense was proved. The defendant had a fair trial, and the verdict is the natural and necessary result of that kind of an investigation of the facts.

The judgment is affirmed.

---

THE STATE OF KANSAS, *Appellant*, v. JOHN W. RADFORD, *Appellee*.

No. 17,106.

THE STATE OF KANSAS, *Appellant*, v. JOHN W. RADFORD, *Appellee*.

No. 17,107.

Appeal from Wyandotte court of common pleas; HUGH J. SMITH, judge. Opinion filed June 17, 1910. Reversed.

*Fred S. Jackson*, attorney-general, *John Marshall*, assistant attorney-general, *Charles D. Shukers*, special assistant attorney-general, and *Joseph Taggart*, county attorney, for the appellant.

*John A. Hale*, and *Richard J. Higgins*, for the appellee.

*Per Curiam*: These cases involve the same questions as *The State v. Radford*, ante, p. 853, and are reversed for the same reasons.





# INDEX.

## A.

ABANDONMENT—See CONTRACTS.

ABATEMENT—See ACTIONS AND REMEDIES.

ABBREVIATIONS—See OFFICE AND OFFICERS, 2; SCHOOLS AND SCHOOL LAND, 14.

ABSTRACT OF THE RECORD—See PRACTICE, SUPREME COURT.

ABSTRACT OF TITLE—See SALES.

ABUSE OF DISCRETION—See DISCRETIONARY MATTERS.

ABUTTING OWNERS—See CITIES AND CITY OFFICERS, 14.

ACCIDENT—See PERSONAL INJURIES; RAILROADS, 16.

ACCORD AND SATISFACTION:

Appearance by attorney.—See BONDS, 3.  
Extinguishment of debt of principal.—See SURETYSHIP AND GUARANTY, 6.

1. **Authority of party accepting tender.**—The acceptance of a tender in satisfaction of a claim did not operate as an accord and satisfaction nor preclude plaintiff from recovering the entire debt, the acceptance being made by one without authority to make the settlement and whose act was not ratified. *Matheney v. El Dorado*.....720, 723
2. **Requisites.**—To constitute an accord and satisfaction, the agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must have been entered into by the parties understandingly and with unity of purpose. *Id.*.....720, 722

ACCOUNTS AND ACCOUNTING:

See BONDS, 14, 15; CRIMINAL LAW, 7; EVIDENCE, 67; MORTGAGES, 2.

1. **Causes of action—pleading.**—In an action for defendant's failure to account and pay over to his successor the money in his hands as treasurer, the petition stated a single cause of action. *Newton v. Toevs*, 18
2. **Guardians.**—A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly*..... 1
3. **Limitation of actions.**—In an action for an accounting defendant by a stipulation waived the statute of limitations. *Newton v. Toevs*..... 20

(865)

55—82 KAN.

## ACCOUNTS AND ACCOUNTING—CONTINUED:

4. *Referee*.—Where defendant demanded a jury trial it was said the case involved the examination of long accounts and was a proper one for reference. *Id.*..... 18

## ACCUSATION—See CONTEMPT.

## ACKNOWLEDGMENT—See OFFICE AND OFFICERS.

## ACTIONS AND REMEDIES:

See ACCOUNTS AND ACCOUNTING; ATTACHMENT; BONDS; CONTEMPT; CONTRACTS; CONVERSION; CRIMINAL LAW; DAMAGES; DISBARMENT PROCEEDINGS; DIVORCE AND ALIMONY; EJECTMENT; FALSE IMPRISONMENT; FRAUD; GUARDIAN AND WARD; INJUNCTION; MANDAMUS; MONEY PAID; MORTGAGES; PERSONAL INJURIES; QUIETING TITLE; QUO WARRANTO; REFLEVIN; SPECIFIC PERFORMANCE; SURETYSHIP AND GUARANTY; TRADE-MARKS; TRESPASS AND TRESPASSERS; TRUSTS AND TRUSTEES.

Cancellation of instruments.—See CONTRACTS, 34, 35, 70; DEEDS.

Condemnation proceedings.—See HIGHWAYS, 1.

Destruction of shade trees growing in public streets.—See CITIES AND CITY OFFICERS, 14.

Foreclosure.—See MECHANIC'S LIEN; MORTGAGES.

Injury by a mob.—See CITIES AND CITY OFFICERS.

Injury by trespassing animals.—See TRESPASS AND TRESPASSERS.

Misfeasances of officers acting in a governmental capacity.—See CITIES AND CITY OFFICERS, 12, 13.

Neglect or refusal to perform official duty.—See OFFICE AND OFFICERS.

Quantum meruit.—See CONTRACTS, 38, 39.

Recovery of dividend paid out of invested capital.—See CORPORATIONS, 2.

Recovery of real property sold on execution.—See LIMITATION OF ACTIONS.

Reformation of instruments.—See CONTRACTS; TAXATION, 42.

Rents and royalties.—See MINES AND MINERALS.

Vacation of judgment.—See JUDGMENTS.

See COSTS; JUDGMENTS; JURISDICTION; LIMITATION OF ACTIONS; NEW TRIAL; PARTIES; VENUE.

Actual notice of pending action.—See JUDGMENTS, 9, 22, 24.

Expenses.—See DAMAGES, 31.

Jury trial.—See JURY AND JURORS, 2-4.

Loss of time.—See DAMAGES, 31.

Notice of injury and claim for damages.—See RAILROADS, 26-30.

1. Abatement and revivor.—The fact that a minor became of age after judgment in an action brought by his guardian did not abate the appeal by the guardian. *Mitchell v. Kelly*.....1, 4
2. Accrual of action.—(See, also, CONTRACTS, 1, 8-10; COSTS, 6; RAILROADS, 26-30; LIMITATION OF ACTIONS, 2-7.) Where, before a will was probated, a devisee sued to cancel a deed executed by the testator, but after probate filed an amended and supplemental petition, on which the cause was tried, an objection that the action was prematurely brought became immaterial. *Hospital Co. v. Philippi*.....64, 68
3. Action *ex contractu* or *ex delicto*.—Plaintiff was entitled to foreclose a chattel mortgage or waive the conversion and sue on the implied contract to pay the value of the property sold. *Stewart v. Falkenberg*.. 580
4. Adequacy of remedy.—See CONTRACTS, 34-36; INJUNCTION, 1; QUO WARRANTO, 3.
5. Condition precedent to action.—(See, also, DEEDS, 4.) A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to

## ACTIONS AND REMEDIES—CONTINUED:

- an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly*..... 1
6. ——— A demand was not a condition precedent to a replevin action by a chattel mortgagee against a custodian who claimed no interest in the property. *Lemaster v. Fisher*..... 282
7. ——— The failure to surrender notes given for money obtained by fraudulent representations was not a prerequisite to an action for damages for such representations. *Bank v. Hart*..... 398, 402
8. ——— Where an insurance contract provided for the appointment of appraisers in case of disagreement as to the amount of the loss, and that appraisement must precede an action on the policy, the insured could sue on the policy, after disagreement by the appraisers, without offering to appoint other appraisers. *Jerrils v. Insurance Co.*..... 320
- 8a. ——— An objection to the opening of a judgment because plaintiff did not show that he had a valid cause of action not sustained. *Cooper v. Rhea*..... 111
9. Consolidation of actions.—Refusal to permit the consolidation of the action with another action, in which a third party was interpleaded, was not an abuse of discretion. *McCullough v. Hayde*..... 734
10. Dismissal.—(See, also, No. 1.) Where omissions in the abstract of the record were cured by the counter abstract a motion to dismiss was denied, but the costs of the counter abstract were taxed to appellant. *Butler v. Butler*..... 132
11. ——— A motion to dismiss the appeal because the appellant did not make his codefendant a party was denied. *Marks v. Chumos*..... 563
12. Election of remedies or defenses.—(See, also, Nos. 17, 18, 31.) In an action to recover purchase money the defendant, who with his wife executed a deed and asked specific performance, was estopped to claim the contract was void because the land was a homestead and the wife did not join in the contract. *McNutt v. Nellans*..... 424, 428
13. ——— One who objected to the establishment of a 40-foot road, but claimed damages, was not thereby estopped to assert that the road was not legally established. *Bowland v. McDonald*..... 84, 89
14. ——— Where after land was leased for crop rent and the tenant paid \$100 for the hay crop the landlord conveyed, warranting against encumbrances, the grantee was entitled to recover but \$100 for breach of warranty, having ratified the lease by accepting the landlord's share of the other crops. *Chase v. Barnes*..... 28
15. Fictitious suit.—Where an officer refuses to perform an act which he believes the statute requires, because

## ACTIONS AND REMEDIES—CONTINUED:

- of a doubt and because he wishes an early decision by a court, a proceeding by the state to compel such action is not fictitious. *The State v. Dolley*.....533, 537
16. Joinder of causes of action.—In an action to reform a chattel mortgage and enforce it there was no misjoinder of causes of action. *Stewart v. Falkenberg* .....576, 579
17. ——— In an action for fraudulent misrepresentation the petition stated a single cause of action. *Bank v. Hart*.....398, 400
18. ——— A petition asking that a deed be canceled because of the mental incapacity of the grantor and the undue influence exercised upon him stated only a single cause of action. *Hospital Co. v. Philippi*...65, 71
19. Joint or separate causes of action.—(See, also, Nos. 33, 34.) A landlord who is to receive crop rent may maintain an action for injury to the growing crop without joining the tenant, but can only recover to the extent of his share. *Sayers v. Railway Co.* .....123, 124
20. ——— A purchaser and seller of machinery were engaged in a joint undertaking in installing it, and were jointly and severally liable to an employee negligently injured. *Fliege v. Railway Co.*.....147, 149
21. ——— Where several stockholders of a corporation unite in fraudulently procuring a dividend to be paid partly out of invested capital they are liable jointly to the extent of the total excess received by all. *Mercantile Co. v. Stiefel*.....7, 14
22. Laches.—Laches is ordinarily no defense in an action to quiet title or remove a cloud where the plaintiff is in possession. *Harris v. Defenbaugh*.....765, 769
23. ——— Where, by reason of long lapse of time, there is a possible loss of testimony or increased difficulty of defense, the doctrine may be applied in the discretion of the court; but laches does not consist in mere lapse of time. *Id.*.....766, 770
24. ——— The doctrine of laches is never invoked in aid of a party where the equities are not in his favor. *Id.* .....766, 771
25. ——— There are no equities in favor of a tax-deed holder as against the owner of land. The rights of a tax-title holder are purely statutory. *Id.*.....766, 771
26. ——— Laches can not be imputed to the owner of land for failure to begin an action to annul a tax deed, where the tax-title holder is not in adverse possession. *Id.*.....766, 771
27. ——— Where the legal owner sues to quiet title against the holder of a defective tax deed less than five years old laches is not a defense because plaintiff failed to pay taxes or to record his title papers or take possession until defendant acquired his rights. *Id.* .....766, 773

## ACTIONS AND REMEDIES—CONTINUED:

28. ——— Retention of possession for a reasonable time in reliance on a vendor's promise to perfect title is not such proof of laches as will necessarily defeat a rescission of the contract. *Read v. Loftus*.....485, 492
29. *Lis pendens*.—One who leased land from the party to whom it was awarded by the trial court was bound by the result of the appeal, although no supersedeas bond was given. *Kremer v. Schutz*.....175, 177
30. ——— Where land was awarded to a husband in a divorce suit, a lessee from the husband was bound to know that an appeal had been taken, and his leasehold was taken at the risk of a reversal of the judgment. *Id.*.....175, 176
31. *Mistake as to remedy*.—A lessor held entitled to recover rent that accrued while an action by him to cancel the lease was pending. *Myers v. Shertzer*.... 275
32. *Mistake of law*.—One who, under a mistake of law, accepted stock of no value in part payment for his land had no recourse against the purchaser. *Cemetery Association v. Hanslip*..... 27
33. *Multiplicity of actions*.—(See, also, Nos. 19-21.) An opportunity to test in a single suit the reasonableness of legislative rates is not essential to the protection of a carrier claiming that such rates are unreasonable. *Tucker v. Railway Co.*.....222, 226
34. ——— A penalty is incurred by a carrier for each day of neglect after the prescribed time for furnishing cars demanded, and each penalty is a distinct liability. *Milling Co. v. Railway Co.*.....256, 261

ADEQUATE REMEDY AT LAW—See CONTRACTS, 34-36;  
INJUNCTION, 1.

ADJOINING OWNERS—See FENCES.

ADJUDICATIONS—See JUDGMENTS.

ADMINISTRATORS—See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS—See EVIDENCE; PLEADINGS.

ADVERSE POSSESSION—See ACTIONS AND REMEDIES, 26.

ADVERTISEMENT FOR BIDS—See COUNTIES, 16, 18.

## AFFIDAVIT:

See BONDS, 2; PRACTICE, SUPREME COURT, 12; PROCESS, 5-9.

1. *Authentication—Jurat*.—The omission of a jurat from an affidavit made the basis of judicial action was a mere irregularity, and the proceeding was not subject to collateral attack. *James v. Logan*.....285, 289
2. ——— Evidence held sufficient to show that a written declaration used as an attachment affidavit was made under oath, although no jurat appears. *Id.*.....285, 289
3. ——— The statutory certificate for the authentication of depositions can not be used on the ordinary affidavit, and the code prescribes no form of jurat to be appended to affidavits. *Id.*.....285, 287

## AFFIDAVIT—CONTINUED:

4. ——— A written declaration under oath is an affidavit although no jurat is attached. *Id.*.....285, 287
5. ——— The jurat is evidence that an oath was administered, and in the absence of a jurat the fact may be proved by evidence *aliunde*. *Id.*.....285, 288

## AFTER-ACQUIRED PROPERTY—See MECHANIC'S LIEN.

AGE—See ACTIONS AND REMEDIES, 1; INSURANCE, 22; PROCESS, 9.

## AGENCY:

1. **Admissions by agent.**—Testimony that after an accident defendant's foreman said it was his fault and he had neglected his duty was hearsay. *Pilgrim v. Verdigris*.....114, 117
2. **Authority.**—Where a husband is ordered to join with his wife in executing a conveyance of her land upon her request he is not compelled to act until requested to do so by her or by some person authorized by her to make such request. *Butler v. Butler*..... 130
3. ——— Conditions of a contract forbidding a shipper of stock to board a moving train were waived by defendant's conductor; the shipper was not a mere licensee, and the carrier was liable for damages sustained by him. *Leslie v. Railway Co.*.....152, 157
4. ——— Because an original contract required approval by the principal on account of the agent's limited authority was no reason the renewal contract should be approved, the agent having been clothed with authority to make contracts. *Brown v. Insurance Co.*..... 442
5. ——— Where a lodge officer to whom insurance assessments are payable pays an assessment for a member, the officer's successor has no power to divert money paid by the member on a subsequent assessment to reimburse his predecessor. *Mosiman v. Benefit Association* .....670, 672
6. ——— A city that appointed a superintendent to supervise the building of a bridge, having accepted the work done under his supervision, could not deny liability therefor because of irregularity in his appointment. *Matheney v. El Dorado*.....720, 724
8. ——— The acceptance of a tender in satisfaction of a claim did not operate as an accord and satisfaction nor preclude plaintiff from recovering the entire debt, the acceptance being made by one without authority to make the settlement and whose act was not ratified. *Id.*.....720, 723
9. ——— The act of a local officer in accepting past-due assessments without requiring a health certificate was adopted by the association when the general secretary received the money and, after the member's death, notified the beneficiary the payment was unavailing, giving no reason except the mistaken one

AGENCY—CONTINUED:

- that the amount was insufficient. *Mosiman v. Benefit Association* ..... 670, 673
10. ——— A husband was his wife's agent, and she was answerable for the fraud which he committed while acting within the scope of his authority. *Mercantile Co. v. Stiefel*.....7, 14
11. ——— Where a shipper used a contract under which defendant claimed the stock was shipped, in order to secure a return pass, he was held to have ratified the execution and signing of the contract, regardless of whether he authorized anyone to sign it for him. *Watt v. Railway Co.*..... 458
12. **Commissions.**—See SALES.
13. **Confidential relations.**—The facts did not make a case for the application of the statutory provision that a will written by a principal beneficiary and confidential agent can not be held valid unless it be affirmatively shown that the testator knew its contents and had independent advice. *Sellards v. Kirby* .....291, 296
14. **Existence of the relation.**—Where the determination of a question of fact necessitates the consideration of all the evidence, which is conflicting, it is error to direct the jury's attention to a small portion of the evidence and instruct them to find for plaintiff if such evidence establishes the fact. *Schick v. Warren*..... 90
15. **Knowledge of agent—notice to principal.**—A corporation in dealing with one of its own officers, who acts for himself and not for it, is not chargeable with notice of facts known to him. *Bank v. Northup*.... 643
16. ——— Where the president of a corporation negotiated a loan for it from a bank, of which he was cashier, and did not communicate to other officers of the bank his knowledge that the corporation's stock, nominally paid up, was issued at a discount, his knowledge was not imputable to the bank and did not defeat its right to recover from the corporate shareholders to the extent to which they had not paid the face value of their stock. *Id.*.....639, 643
17. ——— A railway company had sufficient notice of an injury to an employee and his claim for damages. *Smith v. Railway Co.*.....248, 255
18. **Respondeat superior.**—A city is not liable in damages for misfeasances of its officers acting in a governmental capacity. *Edson v. Olathe*..... 4
19. ——— The rule applied in an action against a city for the passage of an ordinance repealing a franchise ordinance. *Id.*..... 4

ALIMONY—See DIVORCE AND ALIMONY.

ALTERATION OF WRITINGS—See NEGOTIABLE INSTRUMENTS; WILLS.

AMBIGUITY—See CONTRACTS, 25-28.



**AMENDMENT**—See BONDS, 1; PLEADINGS; PROCESS, 16, 17; SCHOOLS AND SCHOOL LAND, 5.

**AMOUNT IN CONTROVERSY**—See JURISDICTION.

**ANIMALS**—See TRESPASS AND TRESPASSERS.

**ANSWER:**

See PLEADINGS; QUIETING TITLE, 6, 7.

Accusation waived.—See CONTEMPT.

Amendment.—See PLEADINGS.

Answers to special questions.—See JURY AND JURORS.

General denial.—See PLEADINGS.

**APPEAL AND ERROR:**

See PRACTICE, SUPREME COURT.

Condemnation proceedings.—See HIGHWAYS, 1.

Continuance of injunction in force by appeal.—See INJUNCTION.

*Lis pendens*.—See LANDLORD AND TENANT, 4, 5.

**APPEARANCE**—See BONDS; JURISDICTION.

**APPOINTMENT**—See OFFICE AND OFFICERS.

**APPRAISEMENT**—See INSURANCE; SALES; SCHOOLS AND SCHOOL LAND.

**ARBITRATION AND AWARD**—See INSURANCE, 2, 3; SALES, 17.

**ARREST ON VIEW**—See FALSE IMPRISONMENT, 1.

**ASSESSMENTS**—See INSURANCE; TAXATION.

**ASSIGNMENT**—See CONTRACTS, 5, 6, 72; INSURANCE; PARTIES; SCHOOLS AND SCHOOL LAND; TAXATION, 13, 65.

**ASSISTANT ATTORNEY-GENERAL**—See PLEADINGS, 17.

**ASSUMPTION OF RISK**—See PERSONAL INJURIES.

**ATTACHMENT:**

1. **Affidavit.**—Evidence held sufficient to show that a written declaration used as an attachment affidavit was made under oath, although no jurat appears. *James v. Logan*. . . . . 285, 289
2. **Measure of damages—garnishment of money and notes.**—The measure of damages for the wrongful attachment of money and notes by way of garnishment is interest on the money and notes during the time they were held and the necessary expenses incurred in regaining possession of the property. *Dody v. Bank*, 406
3. ——— Neither the loss of prospective profits in the general business of the owner nor injury to his credit are elements of damage. *Id.*. . . . . 406
4. **Residence.**—The evidence justified holding that defendants were residents of the state when an attachment was issued. *Scott v. Arneal*. . . . . 208

**ATTESTING WITNESSES**—See WILLS, 26, 28.

**ATTORNEYS:**

Abstract of the record.—See PRACTICE, SUPREME COURT.

Advice.—See SALES, 13.

Appearance.—See BONDS, 8.

Briefs.—See PRACTICE, SUPREME COURT, 2.

**ATTORNEYS—CONTINUED:**

1. **Disbarment.**—The evidence and findings held to authorize and require the revocation of the license of the accused to practice law in this state. *In re Washington* ..... 829
2. **Fees.**—(See, also, DAMAGES, 31; LIMITATION OF ACTIONS, 11.) A claim of error in admitting testimony of the amount paid attorneys not sustained. *Heneks v. Young* ..... 860, 861
3. **Refusal to specify errors complained of.**—Where the court requests an applicant for a new trial to point out specifically the errors complained of, and the applicant declines or neglects to do so, any error in denying the motion will be regarded as waived. *Riverside v. Bailey* ..... 429

**AUDITOR—See MANDAMUS.**

**AUTHORITY:**

Action by resolution or by ordinance.—See CITIES AND CITY OFFICERS.  
 Agent.—See AGENCY.  
 Assignment of tax-sale certificate.—See TAXATION, 18, 65.  
 Assistant attorney-general.—See PLEADINGS, 17.  
 Board of equalization.—See TAXATION, 14-20.  
 County commissioners.—See COUNTIES.  
 Delegation.—See CONSTITUTIONAL LAW.  
 Dividends.—See CORPORATIONS.  
 Establishment of a highway.—See HIGHWAYS.  
 Execution of tax deed.—See TAXATION, 18, 65.  
 Issuance of bonds.—See CITIES AND CITY OFFICERS, 6, 7.  
 Power to issue or sell stock.—See CORPORATIONS.  
 Removal of shade trees growing in streets.—See CITIES AND CITY OFFICERS.

**AUTOMOBILES—See DAMAGES, 22; PERSONAL INJURIES, 55.**

**B.**

**BANK CHECK—See NEGOTIABLE INSTRUMENTS, 5, 6; SPECIFIC PERFORMANCE, 12; SURETYSHIP AND GUARANTY, 6.**

**BANKRUPTCY:**

1. **Conveyance by a bankrupt during pendency of proceedings.**—Where, during bankruptcy proceedings, a bankrupt conveys all his interest in the property, after his discharge the reversionary title to any property undisposed of vests in the bankrupt's grantee. *Robertson v. Howard* ..... 588
2. **Preference by bankrupt.**—A chattel mortgage on his stock by an insolvent merchant, executed less than four months prior to his bankruptcy, held to be a voidable preference under the national bankruptcy act. *Brooks v. Bank* ..... 597
3. ——— In an action by the trustee of a bankrupt to recover a payment as a preference, where it appeared by the undisputed facts that the creditor had reasonable cause to believe that the debtor was insolvent and intended a preference, it was not error to direct a verdict for plaintiff. *Shale v. Bank* ..... 649
4. **Title of trustee—interest of bankrupt.**—The title of the trustee to the bankrupt's property, and the in-

## BANKRUPTCY—CONTINUED:

terest of the bankrupt therein, stated. *Robertson v. Howard* ..... 588

5. **Trustee's sale of land—jurisdiction.**—A sale of a certificate of school land situated in this state by a foreign trustee in bankruptcy was made without jurisdiction, and conveyed no interest in the land to the purchaser. *Id.*..... 588

**BARNES LAW**—See SCHOOLS AND SCHOOL LAND, 3-6.

**BENEFIT ASSOCIATIONS**—See INSURANCE.

**BIDS**—See COUNTIES, 16, 18; TAXATION, 54.

**BILL OF EXCEPTIONS**—See EVIDENCE; PRACTICE, DISTRICT COURT, 12-14.

**BILLS AND NOTES**—See NEGOTIABLE INSTRUMENTS.

**BOARD OF COUNTY COMMISSIONERS**—See COUNTIES.

**BOARD OF EQUALIZATION**—See TAXATION, 14-20.

## BONDS:

See GUARDIAN AND WARD, 1.

1. **Appeal—signature of sureties.**—An appeal bond signed only by the principal is not a nullity, and may be amended by adding signatures of sureties after the statutory time for executing the bond has expired. *Elliott v. Bellevue*..... 79
2. ——— Signers of an affidavit indorsed on an appeal bond who described themselves as sureties held to have executed the bond, although their signatures were not otherwise attached to it. *Id.*..... 78
3. **Appearance—forfeiture.**—Where one charged with a misdemeanor is released on bond and at the time set for trial appears by attorney only it is within the discretion of the justice of the peace to proceed with the trial or to forfeit the bond. *The State v. Johnson* ..... 450
4. **Municipal—aid of railroads.**—The statute authorizing municipalities to issue bonds in aid of railroads is not repugnant to the constitutional prohibition against the state's being a party in carrying on works of internal improvement. *Railroad Co. v. Nation*..... 345, 346
5. ——— The duty of the state auditor to register and certify municipal bonds in aid of railroads stated. *Id.* ..... 345, 350
6. ——— A showing of expenditures equal to the face value of the bonds held not a prerequisite to the registration of such bonds. *Id.*..... 345, 350
7. ——— The decision of the county board as to whether a railway company had fulfilled the conditions of the contract so as to entitle it to the issuance of bonds voted held not conclusive. *Railroad Co. v. Scott County* ..... 804, 805
8. ——— Errors in the first publication of a sheriff's proclamation of an election to vote upon a railroad-

**BONDS—CONTINUED:**

- bond proposition held to be formal defects and not to render the election void. *Id.*.....795, 805
9. ——— A railway company, having substantially complied with the conditions of the contract within the time stated in the proposition submitted to the voters, was entitled to have the bonds that had been voted issued. *Id.*.....795, 801
  10. ——— The statutory provision for calling a second election to vote upon a railroad-aid bond proposition does not limit the number of elections that may be called. *Id.*.....795, 806
  11. ——— The word "second" in such statute means "another." *Id.*.....795, 806
  12. **Municipal—limitation.**—The statutes limiting the bonded indebtedness of cities of the second or third class construed, and their authority to issue bonds determined. *Goodland v. Nation*..... 200
  13. **Obligees—parties entitled to sue.**—A receiver's bond running to parties named and "all persons interested" protected one who loaned money, upon the court's order, to care for the property in the receiver's custody. *Bank v. Varner*.....691, 694
  14. **Receivers.**—(See, also, No. 13.) The failure of a receiver to pay over money in his hands, as directed by the court, constituted a breach of his bond, for which he and his surety were liable. *Id.*.....692, 695
  15. ——— The finding and order of the court as to payment and distribution of the fund, made in the action in which a receiver was appointed, was evidence against a surety to show a breach of the conditions of the receiver's bond. *Id.*.....692, 695
  16. **Replevin.**—Where a successful defendant in replevin brought an action for damages on the replevin bond, loss of time, attorney's fees and expenses incurred in defending the replevin action were not recoverable, in the absence of malice or bad faith in bringing the replevin action. *Lake v. Hargis*..... 711
  17. **Supersedeas.**—One who leased land from the party to whom it was awarded by the trial court was bound by the result of the appeal, although no supersedeas bond was given. *Kremer v. Schutz*.....175, 177

**BRIDGES**—See COUNTIES, 20; HIGHWAYS, 2, 8-11; PERSONAL INJURIES, 48; WATERS AND WATERCOURSES, 1.

**BRIEFS**—See PRACTICE, SUPREME COURT, 5.

**BROKERS**—See SALES, 14-16.

**BUILDING CONTRACT**—See DAMAGES, 9.

**BURDEN OF PROOF**—See EVIDENCE.

**BY-LAWS**—See INSURANCE, 16.

## C.

CANCELLATION—See CONTRACTS, 34, 35, 70; DEEDS.

CARRIERS—See RAILROADS.

CASE-MADE—See PRACTICE, SUPREME COURT.

## CASES CITED IN DISSENTING OPINIONS:

Henschell v. Railway Co., 78 Kan. 411.....	637
Telegraph Co. v. Botkin, 79 Kan. 792.....	475
Telegraph Co. v. Gilstrap, 77 Kan. 191.....	475
Telegraph Co. v. Lawson, 66 Kan. 660.....	475

## CASES CRITICIZED, SUPREME COURT:

Adams <i>et al.</i> v. Secor, 6 Kan. 542.....	470
Insurance Co. v. Bank of Blue Mound, 48 Kan. 393....	703

## CASES DISTINGUISHED, COURTS OF APPEALS:

Insurance Co. v. Coverdale, 9 Kan. App. 651.....	325
Kenworthy v. El Dorado, 7 Kan. App. 643.....	454

## CASES DISTINGUISHED, SUPREME COURT:

A. T. & S. F. Rld. Co. v. Lindley, 42 Kan. 714.....	157
Bacon v. Leslie, 50 Kan. 494.....	732
Baldwin v. Baldwin, 73 Kan. 39.....	242
Bethell v. Lumber Co., 39 Kan. 230.....	559
Brick Co. v. Shanks, 69 Kan. 306.....	116
Brown v. Hadley, 43 Kan. 267.....	408
Carney v. Havens, 23 Kan. 82.....	750
Cartwright v. Korman, 45 Kan. 515.....	520
City of Geneseo v. Gas Co., 55 Kan. 358.....	349
City of Horton v. Trompeter, 53 Kan. 150.....	170
Clark v. Mo. Pac. Rly. Co., 48 Kan. 654.....	139
Clay v. Hildebrand, 44 Kan. 481.....	329
Comm'rs Wyandotte Co. v. Abbott, 52 Kan. 148. .816, 817,	819
Cramer v. Iler, 63 Kan. 579.....	532
Curry v. Janicke, 48 Kan. 168.....	329
Davis v. Land Co., 76 Kan. 27.....	160
Edwards v. Fry, 9 Kan. 417.....	242
Enlow v. Hawkins, 71 Kan. 633.....	408
Entrekin v. Chambers, 11 Kan. 368.....	728
Fraternal Union v. Crosier, 70 Kan. 85.....	658
Gas Co. v. Bailey, 77 Kan. 296.....	408
Gibson v. Kueffer, 69 Kan. 534.....	550
Gillett v. Insurance Co., 53 Kan. 108.....	325
Goodman v. Wilson, 54 Kan. 709.....	520
Gribben, <i>Guardian</i> , v. Maxwell, 34 Kan. 8.....	70
Hampe v. Higgins, 74 Kan. 296.....	491
Hatch v. Geiser, 73 Kan. 81.....	658
Hodges v. Farnham, 49 Kan. 777.....	429
Hoge v. Norton, 22 Kan. 374.....	408
Hutchinson v. Leimbach, 68 Kan. 37.....	817
<i>In re</i> Ellis, 76 Kan. 368.....	507
Insurance Co. v. Bank of Blue Mound, 48 Kan. 393....	703
Insurance Co. v. Johnson, 47 Kan. 1.....	325
Insurance Co. v. Thorp, 48 Kan. 239.....	325
Jones v. Standiferd, 69 Kan. 513.....	329, 330
K. C. Ft. S. & G. Rld. Co. v. McHenry, 24 Kan. 501....	634

CASES DISTINGUISHED, SUPREME COURT—CON-  
TINUED:

Kimball and others v. Connor, Starks and others, 3 Kan. 414 .....	329, 330
K. P. Rly. Co. v. Peavey, 34 Kan. 472.....	635
Lanning v. Brown, 79 Kan. 103.....	355
Leavitt, <i>Guardian</i> , v. Files, 38 Kan. 26.....	70
Litowich v. Litowich, 19 Kan. 451.....	50
Markley v. Kramer, 66 Kan. 664.....	768
Means v. Rosevear, 42 Kan. 377.....	781
M. K. & C. Rly. Co. v. Thompson, Mayor, &c., 24 Kan. 170 .....	801
Modern Woodmen v. Hester, 66 Kan. 129.....	352
Nagle v. Tieperman, 74 Kan. 53.....	550
Osborne v. Kimball, 41 Kan. 187.....	183
Railroad Co. v. Green, 60 Kan. 289.....	157
Railroad Co. v. Holland, 60 Kan. 209.....	512
Railway Co. v. Click, 78 Kan. 419.....	139
Railway Co. v. Love, 61 Kan. 433.....	532
Railway Co. v. McElroy, 76 Kan. 271.....	313
Railway Co. v. Medaris, 60 Kan. 151.....	249, 253, 256
Rodgers v. Rodgers, 56 Kan. 483.....	32, 50, 51
Rynearson v. Conn, 77 Kan. 160.....	717
Shellabarger v. Sexsmith, 80 Kan. 530.....	329
State v. Barrett, 27 Kan. 213.....	760
State v. Bundy, 71 Kan. 779.....	391
State v. Campbell, 73 Kan. 688.....	789
State v. Kelley, 71 Kan. 811.....	349
Stewart v. Price, 64 Kan. 191.....	751
Thimes v. Stumpff, 33 Kan. 53.....	428
Van Buskirk v. Lawrence, 82 Kan. 76.....	552
Williams v. McKinney, 34 Kan. 514.....	272
Young v. Railway Co., 57 Kan. 144.....	512

CASES FOLLOWED, COURTS OF APPEALS:

Edgerton v. O'Neil, 4 Kan. App. 88.....	318
Garver v. Graham, 6 Kan. App. 344.....	177
Madison Township v. Scott, 9 Kan. App. 871.....	710
McClung v. Hohl, 10 Kan. App. 93.....	178
Ryan v. Phillips, 3 Kan. App. 704.....	248

CASES FOLLOWED, SUPREME COURT:

Abmeyer v. Bank, 76 Kan. 877.....	283
Adams v. City of Salina, 58 Kan. 246.....	181
Alvey v. Wilson, 9 Kan. 401.....	330
Anthony v. Brennan, 74 Kan. 707.....	302
A. T. & S. F. Rld. Co. v. Brassfield, 51 Kan. 167.....	251
A. T. & S. F. Rld. Co. v. Comm'rs of Jefferson Co., 12 Kan. 127 .....	719
A. T. & S. F. Rld. Co. v. Hughes, 55 Kan. 491.....	741, 742
A. T. & S. F. Rld. Co. v. Koehler, <i>Adm'r</i> , 37 Kan. 463....	251
A. T. & S. F. Rld. Co. v. McCandliss, <i>Adm'r</i> , 33 Kan. 366,	741
A. T. & S. F. Rld. Co. v. Riggs, 31 Kan. 622.....	185
A. T. & S. F. Rld. Co. v. Rowan, 55 Kan. 270.....	853
A. T. & S. F. Rld. Co. v. Vincent, 56 Kan. 344.....	251
Atkinson v. Crowe, 80 Kan. 161.....	719
Aultman v. Knoll, 71 Kan. 109.....	463
Ayers v. Comm'rs of Trego Co., 37 Kan. 240.....	627
Baldwin v. Squier, 31 Kan. 283.....	244

## CASES FOLLOWED, SUPREME COURT—CONTINUED:

Bank v. Dody, 71 Kan. 98.....	407
Bank v. Morse, 60 Kan. 526.....	714
Bank v. Showers, 65 Kan. 431.....	405
Bank v. Woodrum, 60 Kan. 34.....	72
Barahyte v. Real-estate Co., 66 Kan. 390.....	564
Bartlett v. Bank, 70 Kan. 126.....	281
Bashor v. Nordyke & Marmon Co., 25 Kan. 222.....	285
Baughman v. Baughman, 32 Kan. 538.....	46
Baughman v. Harvey, 76 Kan. 767.....	215
Beadle v. K. C. Ft. S. & M. Rld. Co., 48 Kan. 379.....	260
Beecher v. Ireland, 46 Kan. 97.....	329
Bell v. Sternberg, 53 Kan. 571.....	426
Benefit Association v. Wood, 78 Kan. 812.....	672
Beougher v. Clark, 81 Kan. 250.....	568
Black v. Black, 64 Kan. 689.....	162
Board of Education v. The State, 64 Kan. 6.....	508
Bogle v. Gordon, 39 Kan. 31.....	174
Brick Co. v. Stark, 77 Kan. 648.....	165
Brick Co. v. Shanks, 69 Kan. 306.....	212
Bridge Co. v. Miller, 71 Kan. 13.....	663
Briggs v. Comm'rs of Labette Co., 39 Kan. 90.....	366
Brinkmeier v. Railway Co., 69 Kan. 738.....	138, 165
Britton v. Hunt, 9 Kan. 228.....	114
Broadie v. Carson, 81 Kan. 467.....	121
Brown v. Railroad Co., 81 Kan. 701.....	233
Buckland v. Goit, 23 Kan. 327.....	288
Burditt v. Burditt, 62 Kan. 576.....	655
Burgess v. Hixon, 75 Kan. 201.....	121, 122
Butler v. Kaulback, 8 Kan. 668.....	431
Cardom v. Woodward, 44 Kan. 758.....	101
Carl Horne v. The State of Kansas, 1 Kan. 42.....	787
Carpenter v. Wright, 52 Kan. 221.....	449
Carruthers v. C. R. I. & P. Rly. Co., 55 Kan. 600.....	233
Caspar v. Lewin, 82 Kan. 604.....	841
Cemetery Association v. Hanslip, 82 Kan. 20.....	406
Central Branch Rld. Co. v. Ingram, 20 Kan. 66.....	256
Challis v. Wylie, 35 Kan. 506.....	302
Chandler, Adm'r, v. Dye, 37 Kan. 765.....	405
Chapman v. Chapman, 48 Kan. 636.....	46
Chellis v. Coble, 37 Kan. 558.....	57
City of Ellsworth, v. Rossiter, 46 Kan. 237.....	720, 725
City of Emporia v. Smith, 42 Kan. 433.....	819
City of Kingman v. Berry, 40 Kan. 625.....	288
City of Ottawa v. Barney, 10 Kan. 270.....	777
C. K. & N. Rly. Co. v. City of Manhattan, 45 Kan. 419..	349
C. K. & W. Rld. Co. v. Comm'rs of Chase Co., 49 Kan.	
399.....	801, 803
C. K. & W. Rld. Co. v. Comm'rs Osage Co., 38 Kan. 597,	801
C. K. & W. Rld. Co. v. Makepeace, 44 Kan. 676.....	801
C. K. & W. Rld. Co. v. Pontius, 52 Kan. 264.....	251, 254
Clearwater v. Bowman, 72 Kan. 92.....	397
Clippinger v. Fuller, 10 Kan. 377.....	718
Comm'rs of Lyon Co. v. Kiser, 26 Kan. 279.....	866
Comm'rs of Sedgwick Co. v. Bunker, 16 Kan. 498.....	508
Comm'rs of Wabaunsee Co. v. Bisby, 37 Kan. 253..	366, 367
Comm'rs of Wyandotte Co. v. Abbott, 52 Kan. 148....	813
Coon v. Browning, 10 Kan. 85.....	362
Cooper v. Machine Co., 37 Kan. 231.....	285

## CASES FOLLOWED, SUPREME COURT—CONTINUED:

Corum v. Hubbard, 69 Kan. 608.....	18
Cummings v. Railroad Co., 68 Kan. 218.....	165
Cunningham v. Barr, 45 Kan. 158.....	288
Cunningham v. Stockon, 81 Kan. 780.....	83
Cowley County v. Hooker, 70 Kan. 372.....	367
DaLee v. Blackburn, 11 Kan. 190.....	400
Daleschal v. Geiser, <i>Guardian</i> , 36 Kan. 374.....	46
Davis v. Coventry, 65 Kan. 557.....21, 23, 24,	26
Davis v. Finney, 37 Kan. 165.....	404
Davis v. Hagler, 40 Kan. 187.....	40
Davis v. Land Co., 76 Kan. 27.....56,	57
Deere v. Spatz, 78 Kan. 786.....	714
Deisher v. Stein, 34 Kan. 39.....	244
De Long v. Stahl, 13 Kan. 558.....	404
Dodge v. Beeler, 12 Kan. 524.....	498
Dodson v. Covey, 81 Kan. 320.....	125
Donaldson v. Jacobitz, 67 Kan. 244.....162,	449
Doty v. Bitner, 82 Kan. 551.....362,	364
Douglass v. Lowell, 55 Kan. 574.....	521
Douglass v. Nuzum, 16 Kan. 515.....	718
Douglass v. Wilson, 31 Kan. 565.....107,	215
Douthitt v. Applegate, 33 Kan. 395.....	781
Duffitt v. Tuhau, 28 Kan. 292.....	449
Duphorne v. Moore, 82 Kan. 159.....	57
Durland v. Durland, 67 Kan. 734.....	48
Dyerson v. Railroad Co., 74 Kan. 528.....569, 572,	573
Earls v. Earls, 27 Kan. 538.....	575
Edson v. Olathe, 81 Kan. 328.....	5
Eggan v. Briggs, 23 Kan. 710.....	302
Ehrsam v. Mahan, 52 Kan. 245.....	463
Electric Co. v. Jackson County, 81 Kan. 6.....	205
Erie Township v. Beamer, 71 Kan. 182.....	710
Ernst v. Foster, 58 Kan. 438.....	270
Evans v. Kahr, 60 Kan. 719.....	178
Farmers' Bank v. Bank of Glen Elder, 46 Kan. 376....	281
Finney County v. Bullard, 77 Kan. 349.....205,	206
Finn v. Jones, 80 Kan. 431.....	78
Foreman v. Carter, 9 Kan. 674.....	288
Foster v. Turner, 31 Kan. 58.....	212
Fowler v. Enzenperger, 77 Kan. 406.....	165
Fraternal Aid Association v. Powers, 67 Kan. 420....	672
Frederick v. Birkett, 37 Kan. 536.....	426
Frick v. Milling Co., 51 Kan. 370.....	306
Ft. S. W. & W. Rly. Co. v. Sparks, 55 Kan. 288.....	156
Garrett v. Minard, 79 Kan. 470.....	339
Gas Co. v. Altoona, 79 Kan. 466.....	18
Gas Co. v. Glass Co., 56 Kan. 614.....	409
Gibson v. Cockrum, 81 Kan. 772.....142, 144,	215
Gibson v. Johnson, 73 Kan. 261.....	654
Gibson v. Kueffer, 69 Kan. 534.....	768
Gifford v. Griffin, 63 Kan. 716.....	781
Gilchrist v. Schmidling, 12 Kan. 263.....	431
Glenn, <i>County Clerk</i> , v. Hentig, 33 Kan. 156.....	819
Glenn v. Stewart, 78 Kan. 608.....	77
Gooding v. A. T. & S. F. Rld. Co., 32 Kan. 150.....	185
Grocer Co. v. Alleman, 81 Kan. 543.....364,	552
Gunning v. Wyandotte County, 81 Kan. 708.....	218
Hall's Heirs v. Dodge, 18 Kan. 277.....	771



## CASES FOLLOWED, SUPREME COURT—CONTINUED:

Harrell v. Neef, 80 Kan. 348.....	554, 730
Harrison v. Henderson, 67 Kan. 194.....	723
Hart v. Railroad Co., 80 Kan. 699.....	233
Harvester Works Co. v. Cummings, 26 Kan. 367.....	409
Hatch v. Small, 61 Kan. 242.....	48
Hawkins v. Windhorst, 77 Kan. 674.....	523
Hays v. Crist, 4 Kan. 350.....	126
Head v. Daniels, 38 Kan. 1.....	40
Heller v. City of Garden City, 58 Kan. 263.....	236
Hickert v. Van Doren, 76 Kan. 674.....	678
Hinze v. Hinze, 76 Kan. 169.....	449
Hoffmeier v. Railroad Co., 68 Kan. 831.....	853
Holden v. Garrett, 23 Kan. 98.....	362
Holden v. Spier, 65 Kan. 412.....	655
Holderman v. Hood, 70 Kan. 267.....	248
Hollingsworth v. Colthurst, 78 Kan. 455.....	493
Holmberg v. Dean, 21 Kan. 73.....	659
Honey v. Jewell County, 65 Kan. 428.....	380
Horner v. Ellis, 75 Kan. 675.....	57
Howard, <i>Adm'r</i> , v. Entreken, <i>Adm'r</i> , 24 Kan. 428.....	427
Howard v. Carter, 71 Kan. 85.....	72
Howerton v. Gas Co., 82 Kan. 367.....	861, 862
Hutchinson v. Leimbach, 68 Kan. 37.....	813
Hutchison v. Myers, 52 Kan. 290.....	302
Implement Co. v. Schultz, 45 Kan. 52.....	602
<i>In re</i> Boyd, <i>Petitioner</i> , 34 Kan. 570.....	506
<i>In re</i> Elliott, 73 Kan. 151.....	838, 839
<i>In re</i> Gilson, <i>Petitioner</i> , 34 Kan. 641.....	505
<i>In re</i> Greer, 58 Kan. 268.....	192
<i>In re</i> Norris, 60 Kan. 649.....	839
<i>In re</i> Norton, 64 Kan. 842.....	575
<i>In re</i> Smith, 73 Kan. 743.....	839
<i>In re</i> Wallace, 75 Kan. 432.....	37
Insurance Co. v. Corbett, 69 Kan. 564.....	445
Insurance Co. v. Stone, 61 Kan. 48.....	445
Insurance Office v. Woolen-mill Co., 72 Kan. 41.....	511
Johnson v. Jones, 58 Kan. 745.....	339
Jones v. Franks, 33 Kan. 497.....	405
Jones v. Garden City, 81 Kan. 59.....	544
Jones v. Hickey, 80 Kan. 109.....	121
Joyce v. Means, 41 Kan. 234.....	260
Kansas City v. File, 60 Kan. 157.....	151
Kansas City v. McGrew, 78 Kan. 335.....	862
Kerns v. Kansas City, 79 Kan. 562.....	738
Kessler v. Polkosky, 81 Kan. 69.....	107, 145, 146, 551
King v. King, 79 Kan. 584.....	336
King v. Machine Co., 81 Kan. 809.....	494
King v. Mead, 60 Kan. 539.....	362, 552
K. P. Rly. Co. v. Landis, 24 Kan. 406.....	185
Krapp v. Aderholt, 42 Kan. 247.....	405
Kremer v. Kremer, 76 Kan. 134.....	176
Kruse v. Conklin, 82 Kan. 358.....	552
Laithe v. McDonald, 7 Kan. 254.....	281, 471
Landrum v. Flannigan, 60 Kan. 436.....	855
Larimer v. Knoyle, 43 Kan. 338.....	37, 41
Larkin v. Taylor, 5 Kan. 433.....	125
Leavenworth County v. Miller, 7 Kan. 479.....	346, 350
Leeman v. Page, 79 Kan. 479.....	738

CASES FOLLOWED, SUPREME COURT—CONTINUED:

Litowich v. Litowich, 19 Kan. 451.....	52
L. L. & G. Rld. Co. v. Van Riper, 19 Kan. 317.....	330
L. N. & S. Rly. Co. v. Wilkins, 45 Kan. 674.....	431
Loan Co. v. Cable, 65 Kan. 306.....	427
Loan Co. v. Essex, 66 Kan. 100.....	857
Loan Co. v. Marks, 59 Kan. 230.....	340
Lohmuller v. Mosher, 74 Kan. 751.....	273
Lumber Co. v. Fretz, 51 Kan. 134.....	561
Lunn v. Morris, 81 Kan. 94.....	663
Lynch v. Chase, 55 Kan. 367.....	756, 761
L. & W. Rly. Co. v. Hawk, 39 Kan. 638.....	212
Madison v. Clippinger, 74 Kan. 700.....	165
Manley v. Park, 68 Kan. 400.....	751
Manufacturing Co. v. Bloom, 76 Kan. 127.....	165
Manufacturing Co. v. Bridge Co., 81 Kan. 616.....	547
Marks v. Chumos, 82 Kan. 562.....	754
Martsof v. Barnwell, 15 Kan. 612.....	26, 406
Matlock v. Shaffer, 51 Kan. 208.....	449
Maynes v. Gray, 69 Kan. 49.....	18
McAllister v. Fair, 72 Kan. 533.....	627, 629
McClelland Bros. v. Allison, 34 Kan. 155.....	80
McCormick v. McCormick, 82 Kan. 31.....	161, 341
McGrew v. Kansas City, 64 Kan. 61.....	777
McKinney v. Stewart, 5 Kan. 384.....	498
McKinstry v. Citizens' Bank, 57 Kan. 279.....	463
McNutt v. McComb, 61 Kan. 25.....	271, 272, 273, 274
McNutt v. Nellans, 82 Kan. 424.....	595
Medill v. Snyder, 61 Kan. 15.....	68
Milburn v. Beaty, 81 Kan. 696.....	207
Miller v. Davis, 10 Kan. 541.....	579
Miller v. Miller, 81 Kan. 397.....	343
Mills v. Kansas Lumber Co., 26 Kan. 572.....	657
Mitchell v. Mitchell, 20 Kan. 665.....	46
M. K. & T. Rly. Co. v. City of Fort Scott, 15 Kan. 435..	409
Modern Woodmen v. Gerdorn, 72 Kan. 391.....	842
Modern Woodmen v. Gerdorn, 77 Kan. 401.....	842
Mo. Pac. Rly. Co. v. Reynolds, 31 Kan. 132.....	212
Mo. Pac. Rly. Co. v. Shumaker, 46 Kan. 769.....	185
Morris v. Morris County, 7 Kan. 576.....	346, 350
Morris v. Sadler, 74 Kan. 892.....	41
Morris v. Wicks, 81 Kan. 790.....	364, 552
Mound City v. Snoddy, 53 Kan. 126.....	725
Munn v. Taulman, 1 Kan. 254.....	542
Munroe v. City of Lawrence, 44 Kan. 607.....	763
Myers v. Shertzer, 82 Kan. 275.....	714
Nagle v. Tieperman, 74 Kan. 32.....	107
National Bank v. Clark, 55 Kan. 219.....	411
Newton v. Toevs, 82 Kan. 15.....	404
Noftzger v. Moffett, 63 Kan. 354.....	861
Oberlin Loan Co. v. Flinn, 58 Kan. 83.....	678
O'Brien v. Wetherell, 14 Kan. 616.....	245
O'Keefe v. Behrens, 73 Kan. 469.....	291
O'Keefe v. National Bank, 49 Kan. 347.....	302
Olsson v. City of Topeka, 42 Kan. 709.....	777
Ordway v. Cowles, 45 Kan. 447.....	112, 113
Ottawa v. Johnson, 73 Kan. 165.....	80
Owen v. Owen, 9 Kan. 91.....	405

## CASES FOLLOWED, SUPREME COURT—CONTINUED:

Paine v. Spratley, 5 Kan. 525.....	771
Paola v. Wentz, 79 Kan. 148.....	236
Parker v. Berry, 12 Kan. 351.....	57
Patterson v. Railway Co., 77 Kan. 236.....	263
Penrose v. Cooper, 71 Kan. 725.....	146
Phillips v. Phillips, 69 Kan. 324.....	47
Plaster Co. v. Blue Rapids Township, 81 Kan. 730, 39, 340, 341, 470	
Plow Co. v. Witham, 52 Kan. 185.....	411
Poole v. French, 71 Kan. 391.....	588, 594
Prather v. Reeve, 23 Kan. 627.....	189
Pyramids v. Drake, 66 Kan. 538.....	672
Railroad Co. v. Abilene, 78 Kan. 820.....	819
Railroad Co. v. Jackson, 70 Kan. 791.....	185
Railroad Co. v. Kansas City, 73 Kan. 571.....	862
Railroad Co. v. Morris, 76 Kan. 836.....	165
Railroad Co. v. Norris, 76 Kan. 836.....	336
Railroad Co. v. Penfold, 57 Kan. 148.....	586
Railroad Co. v. Willey, 57 Kan. 764.....	319
Railway Co. v. Bancord, 66 Kan. 81.....	138
Railway Co. v. Baumgartner, 74 Kan. 148.....	233
Railway Co. v. Durand, 65 Kan. 380.....	151
Railway Co. v. Geiser, 68 Kan. 281.....	212
Railway Co. v. Grain Co., 68 Kan. 585.....	627
Railway Co. v. Holloway, 71 Kan. 1.....	570, 742
Railway Co. v. Jenkins, 79 Kan. 698.....	356
Railway Co. v. Loewe, 69 Kan. 843.....	742
Railway Co. v. Michaels, 57 Kan. 474.....	138, 853
Railway Co. v. Moffatt, 60 Kan. 113.....	174
Railway Co. v. Olden, 72 Kan. 110.....	186
Railway Co. v. Paxton, 75 Kan. 197.....	630
Railway Co. v. Rhoades, 64 Kan. 553.....	233
Railway Co. v. Thomas, 70 Kan. 409.....	409
Railway Co. v. Walker, 79 Kan. 31.....	140
Railway Co. v. Walters, 78 Kan. 39.....	739, 741
Railway Co. v. Watkins, 76 Kan. 813.....	309
Railway Co. v. Wimmer, 72 Kan. 566.....	741
Randall v. Barker, 67 Kan. 774.....	427
Rathbun v. Berry, 49 Kan. 735.....	602
Reemsnyder v. Reemsnyder, 75 Kan. 565.....	460
Reitler v. Harris, 80 Kan. 148.....	121
Remington v. Walthall, 82 Kan. 234.....	857
Renard v. Bennett, 76 Kan. 848.....	842
Ritchie v. Mulvane, 39 Kan. 241.....	419
Roberts v. Fagan, 76 Kan. 536.....	48
Roberts v. St. Marys, 78 Kan. 707.....	725
Roe v. Roe, 52 Kan. 724.....	32, 44
Rowe v. Palmer, 29 Kan. 337.....	57
Russell v. Smith, 14 Kan. 366.....	659
Safe Deposit Co. v. Stich, 61 Kan. 474.....	273
Schmalstieg v. Coal Co., 65 Kan. 753.....	335, 337
School District v. Wilson County, 82 Kan. 806.....	786
Schuler v. Fowler, 63 Kan. 98.....	111
Shaffer, <i>Adm'r</i> , v. Brinkman, 31 Kan. 124.....	575
Shale v. Bank, 82 Kan. 649.....	603
Sherman v. Luckhardt, 67 Kan. 682.....	600
Shoup v. C. B. U. P. Rld. Co., 24 Kan. 547.....	135
Simon v. Stetter, 25 Kan. 155.....	288

## CASES FOLLOWED, SUPREME COURT—CONTINUED:

Simpson v. Kimberlin, 12 Kan. 579.....	39, 161
S. K. Rly. Co. v. Sanford, 45 Kan. 372.....	742
S. K. Rly. Co. v. Walsh, 45 Kan. 653.....	212
S. K. & P. Rld. Co. v. Towner, 41 Kan. 72.....	801, 802
Small and others v. Douthitt and others, 1 Kan. 335....	111
Smith v. Land Co., 82 Kan. 539.....	768
Smith v. Newman, 62 Kan. 318.....	532
Smith v. Railway Co., 82 Kan. 136.....	256, 511, 853
Snider v. Windsor, 77 Kan. 67.....	174
State Bank v. Kuhnle, 50 Kan. 420.....	727
States v. Durkin, 65 Kan. 101.....	409
State, <i>ex rel.</i> , v. Nemaha County, 7 Kan. 542... 346, 348,	350
State, <i>ex rel.</i> , v. Parry, 52 Kan. 1.....	194
State, <i>ex rel.</i> , v. Scates, 43 Kan. 330.....	383
State v. Balliet, 63 Kan. 707.....	432
State v. Baxter, 41 Kan. 516.....	455
State v. Bowden, 80 Kan. 49.....	388
State v. Bowles, 70 Kan. 821.....	505
State v. Burton, 70 Kan. 199.....	18
State v. Bush, 47 Kan. 201.....	386
State v. Calhoun, 75 Kan. 259.....	391
State v. Ellvin, 51 Kan. 784.....	455, 456
State v. Everett, 62 Kan. 275.....	432
State v. Furney, 41 Kan. 115.....	787
State v. Hansford, 81 Kan. 300.....	391
State v. Hart, 33 Kan. 218.....	392
State v. Hutchings, 79 Kan. 191.....	574
State v. Lawrence, 80 Kan. 707.....	536
State v. Miller, 63 Kan. 62.....	793
State v. Nation, 78 Kan. 394.....	441
State v. Nickerson, 30 Kan. 545.....	761
State v. Radford, 82 Kan. 853.....	863
State v. Railway Co., 76 Kan. 467.....	26
State v. Railway Co., 81 Kan. 430.....	535
State v. Spendlove, 47 Kan. 160.....	392
State v. Tennison, 39 Kan. 726.....	199
State v. Trinkle, 70 Kan. 396.....	382
State v. Williams, 61 Kan. 739.....	505
St. Clair v. Craig, 77 Kan. 394.....	449
St. L., Ft. S. & W. Rld. Co. v. Irwin, 37 Kan. 701.... 139,	853
St. L. & S. F. Rly. Co. v. Dudgeon, 28 Kan. 283.....	285
St. L. & S. F. Rly. Co. v. McReynolds, 24 Kan. 368.....	330
St. L. & S. F. Rly. Co. v. Mossman, 30 Kan. 336.....	185
St. L. & S. F. Rly. Co. v. Riererson, 38 Kan. 359.....	803
St. L. & S. F. Rly. Co. v. Ritz, 33 Kan. 404.....	127
Street v. Morgan, 64 Kan. 85.....	668
Symms v. Graves, 65 Kan. 628.....	205
Taylor v. Miles, 5 Kan. 498.....	771
Thompkins v. Adams, 41 Kan. 38.....	426
Thompson v. Burtis, 65 Kan. 474.....	343
Tobie v. Comm'rs of Brown Co., 20 Kan. 14.....	111
Townsend v. City of Paola, 41 Kan. 591.....	318
Travis v. Supply Co., 42 Kan. 625.....	595
Troyer v. Beedy, 79 Kan. 502.....	63
Trust Co. v. Jones, 81 Kan. 753.....	108
Trust Co. v. Parker, 65 Kan. 819.....	112
U. P. Rly. Co. v. Harris, 33 Kan. 416.....	250
U. P. Rly. Co. v. Harwood, 31 Kan. 388.....	584

## CASES FOLLOWED, SUPREME COURT—CONTINUED:

Union Trust Co. v. Thomason, 25 Kan. 1.....	250
United Workmen v. Smith, 76 Kan. 509.....	673
Valley Township v. Stiles, 77 Kan. 557.....	849
Van Hall v. Goertz, 82 Kan. 142.....	107, 551
Votaw v. McKeever, 76 Kan. 870.....	568
Wagner v. Beadle, 82 Kan. 468.....	540
Waller v. Julius, 68 Kan. 314.....	69
Walrath v. Whittekind, 26 Kan. 482.....	409
Walters v. Chance, 73 Kan. 680.....	654
Washburn v. Buchanan, 52 Kan. 417.....	540
Watson v. Holden, 58 Kan. 657.....	426
Watson v. Holden, 58 Kan. 657.....	595
Weichselbaum v. Curlett, 20 Kan. 709.....	532
Werner v. Bergman, 28 Kan. 60.....	282
Wesner v. O'Brien, 56 Kan. 724.....	47
Wey v. Schofield, 53 Kan. 248.....	260
White v. Gemeny, 47 Kan. 741.....	659
Wichita v. Telephone Co., 70 Kan. 441.....	85
Wickersham v. Chicago Zinc Co., 18 Kan. 481.....	643
Wilkinson v. Elliott, 43 Kan. 590.....	177
Willard v. Ostrander, 51 Kan. 481.....	178
Williams v. McKinney, 34 Kan. 514.....	270
Wilson v. Fuller, 9 Kan. 176.....	659
Winkfield v. Brinkman, 31 Kan. 25.....	575
Winstead, <i>Sheriff</i> , v. Hulme, 32 Kan. 568.....	714
Wm. H. Haight v. Justus Schuck <i>et al.</i> , 6 Kan. 192.....	330
Wooddell v. Allbrecht, 80 Kan. 736.....	14
Worden v. Cole, 74 Kan. 226.....	540, 768
Wulf v. Kansas City, 77 Kan. 358.....	819
Wurtenberger v. Railway Co., 68 Kan. 642.....	332, 336
Wyandotte County v. Investment Co., 80 Kan. 492.....	57
Yandle v. Crane, 13 Kan. 344.....	659
Young v. Gibson, 80 Kan. 264.....	718

## CASES OVERRULED, SUPREME COURT:

Henschell v. Railway Co., 78 Kan. 411 (in part)....	605, 636
Lewis v. Barton, 82 Kan. 163 (in part).....	605, 627
Madison v. Clippinger, 74 Kan. 700 (in part) ..	605, 634, 635

## CEMETERY ASSOCIATIONS—See CORPORATIONS, 14, 20.

## CERTIFICATE:

Acknowledgment of writings.—See OFFICE AND OFFICERS.  
 Health.—See INSURANCE, 23, 24.  
 Tax sale—time of assignment.—See TAXATION, 65.

## CHATTEL MORTGAGES—See MORTGAGES.

## CHILD—See PARENT AND CHILD.

## CITIES AND CITY OFFICERS:

City courts.—See JURISDICTION, 3.  
 Injury to the person.—See PERSONAL INJURIES.

1. Action by resolution or by ordinance.—Although a statutory direction that certain steps shall be taken by ordinance leaves no discretion in the city council as to methods, it is competent for the council by resolution to direct officers in charge of grading a street not to cut down shade trees growing therein until such action shall have been authorized by the council.  
*Remington v. Walthall*.....234, 238

CITIES AND CITY OFFICERS—CONTINUED:

2. **Appointment irregular—implied authority—ratification of acts.**—A city that appointed a superintendent to supervise the building of a bridge, having accepted the work done under his supervision, could not deny liability therefor because of irregularity in his appointment. *Matheney v. El Dorado*..... 720, 724
3. **Assessment of cost of street improvements.**—A tract of platted ground in a city held to constitute a "block" under the statute relating to assessments for the cost of street improvements, although the donor divided the tract by an alley and designated each portion a block. *Bowlus v. Iola*..... 774
4. ——— The fact that in previous similar cases the city acted upon a misinterpretation of the statute in assessing street improvements does not estop it from now proceeding according to law. *Id.*..... 774
5. **Authority of officer—false imprisonment.**—A marshal appointed, confirmed and sworn had authority to arrest on view, without a warrant, although no commission had been issued and he had not subscribed to the oath. *Morrison v. Pence*..... 420, 422
6. **Bonds.**—The statutes limiting the bonded indebtedness of cities of the second or third class construed, and their authority to issue bonds determined. *Goodland v. Nation*..... 200
7. ——— The statute authorizing municipalities to issue bonds in aid of railroads is not repugnant to the constitutional prohibition against the state's being a party in carrying on works of internal improvement. *Railroad Co. v. Nation*..... 345, 346
8. ——— The duty of the state auditor to register and certify municipal bonds in aid of railroads stated. *Id.*..... 345, 350
9. ——— A showing of expenditures equal to the face value of the bonds held not a prerequisite to the registration of such bonds. *Id.*..... 345, 350
10. **Election—qualified voters.**—Marshals of city courts (Laws 1905, ch. 193) are not "city officers," and women are not "qualified voters" in the election of such marshals. *Fee v. Richardson*..... 190, 192
11. **Injury by a mob.**—In an action against a city for injury to the person and property of a saloon keeper by a mob the conduct and reputation of the plaintiff may be shown in mitigation of damages to the property. *Stevens v. Anthony*..... 179
12. **Liability for misfeasances of officers.**—A city is not liable in damages for misfeasances of its officers acting in a governmental capacity. *Edson v. Olathe*.... 4
13. ——— The rule applied in an action against a city for the passage of an ordinance repealing a franchise ordinance. *Id.*..... 4
14. **Removal of shade trees growing in streets.**—(See, also, No. 1.) An arbitrary decision by a city officer, not made in good faith, that shade trees growing in a street are a nuisance, when they are not and there is

## CITIES AND CITY OFFICERS—CONTINUED:

no necessity for cutting them down, is no protection to an officer who cuts them down when an action is brought against him by the abutting owner to recover for their loss. *Remington v. Walshall*..... 234

## 15. Tract held to constitute a block.—See No. 3.

CLUBROOMS—See INTOXICATING LIQUORS.

CODE CITED—See STATUTES CITED, CONSTRUED OR APPLIED.

COLLATERAL ATTACK—See JUDGMENTS.

COLLATERAL EVIDENCE—See EVIDENCE.

COLLUSIVE SUIT—See FRAUD, 5.

COMMISSION—See OFFICE AND OFFICERS, 9.

COMMISSIONS—See SALES, 14-16.

COMMON LAW—See PERSONAL INJURIES, 22-28; RAILROADS, 19, 20.

COMPETITION—See TRADE-MARKS; COUNTIES, 16, 18.

COMPLAINT—See CRIMINAL LAW, 13.

COMPROMISE AND SETTLEMENT—See TAXATION; ACCORD AND SATISFACTION.

CONCEALMENT—See INSURANCE, 1.

CONCLUSIONS OF LAW—See PRACTICE, DISTRICT COURT, 9.

CONDEMNATION PROCEEDINGS—See HIGHWAYS, 1.

CONDITION PRECEDENT—See ACTIONS AND REMEDIES.

CONFESSIONS—See CRIMINAL LAW.

CONFIRMATION—See OFFICE AND OFFICERS, 9.

CONSIDERATION—See CONTRACTS; DEEDS; TAXATION, 47, 49, 53, 56, 57, 60-63, 66-69.

CONSOLIDATION OF ACTIONS—See PRACTICE, DISTRICT COURT.

CONSPIRACY—See EVIDENCE, 33.

## CONSTITUTIONAL LAW:

Elections—qualified voters.—See ELECTIONS, 4.

Fines for breach of penal law.—See RAILROADS, 38.

Full faith and credit—foreign judgment.—See JUDGMENTS, 13.

1. **Delegation of power.**—The statute known as the "rock road law" is not unconstitutional on the ground that it delegates legislative power to the petitioners. *Hill v. Johnson County*.....813, 816
2. **Due process of law.**—(See, also, No. 11.) The penalties prescribed by the act fixing maximum rates for the transportation of oil are not so oppressive that their natural effect is to intimidate carriers from resorting to the courts to test the statute. *Tucker v. Railway Co.* .....223, 226
3. ——— An act fixing rates for transportation will not be held invalid on the ground that the rates are un-

## CONSTITUTIONAL LAW—CONTINUED:

- reasonable without the fullest disclosure of all material facts affecting the question. *Id.*.....223, 228
4. ——— Evidence held insufficient to show that the rates fixed by the act of 1905 for transporting oil are unreasonable. *Id.*.....223, 228
5. ——— An opportunity to test in a single suit the reasonableness of legislative rates is not essential to the protection of a carrier claiming that such rates are unreasonable. *Id.*.....222, 226
6. ——— It is enough that the carrier can not be made to suffer the penalties prescribed until the question of reasonableness has been judicially determined. *Id.*.....222, 226
7. ——— The act establishing maximum rates for the transportation of oil does not forbid a judicial investigation of the reasonableness of the rates fixed by the legislature. *Id.*.....222, 225
8. ——— A statute relating to the improvement of country roads held not invalid because it contains no express provision for notice to property owners before the special assessment becomes a tax on their property. *Hill v. Johnson County*.....813, 819
9. Equal protection of the law.—(See, also, 5-7.) The legislature may segregate oil from other commodities and make its transportation the subject of special regulation, and to secure observance of such regulation may impose special penalties. *Tucker v. Railway Co.*.....222, 224
10. ——— The law fixing maximum rates for transporting oil does not deprive a carrier of the equal protection of the laws because more than two lines of road are not regulated. *Id.*.....224
11. ——— The constitutionality of the fellow-servant act discussed. *Smith v. Railway Co.*.....254
12. ——— A carrier was not a proper party to insist that an act discriminated in favor of one class of shippers as against other shippers. *Tucker v. Railway Co.*.....225
13. Homesteads—joint consent.—See HOMESTEADS AND EXEMPTIONS.
14. Parole law.—In an action to recover from a county the costs of prosecuting a prisoner paroled by the district court, the parole law held not to be invalid. *Mikesell v. Wilson County*.....502, 506
15. Police regulations.—The factory act falls within the legitimate scope of the police power of the state, and the remedy prescribed for its enforcement is not obnoxious to either the state or the federal constitution. *Caspar v. Lewin*.....605, 629
16. Prerequisite to determination of validity of a statute.—A court will undertake to pass upon the validity and effect of a statute only when necessary to the determination of an actual and concrete controversy. *The State v. Dolley*.....533, 536



## CONSTITUTIONAL LAW—CONTINUED:

17. **Property rights of married women.**—The statute allowing a lien on a married woman's real estate for material furnished her husband and used in improving it does not violate the constitutional provision respecting married women's rights to possess property apart from their husbands, nor conflict with the statutory provision that the separate estate of a married woman shall not be subject to the disposal of her husband or liable for his debts. *Garrett v. Loftus*... 556
18. **Retroactive laws.**—(See, also, Nos. 14, 30.) The act of 1907 permitting parol evidence of service and making certain records *prima facie* evidence of a valid forfeiture of school land was intended to operate retroactively, and is not void for that reason. *Walrond v. Noyes*.....119, 120
19. **Right to jury trial.**—See JURY AND JURORS, 2-4.
20. **Self-incriminating testimony.**—See CRIMINAL LAW, 23.
21. **Taxation—works of internal improvement.**—The statute authorizing municipalities to issue bonds in aid of railroads is not repugnant to the constitutional prohibition against the state's being a party in carrying on works of internal improvement. *Railroad Co. v. Nation*.....345, 346
22. **Title of an act.**—The act of 1905 establishing maximum rates for the transportation of oil contains but one subject, which is clearly expressed in its title. *Tucker v. Railway Co.*.....222, 224
23. ——— The statute known as the "Barnes law" is not unconstitutional upon the ground that it violates section 16 of article 2 of the constitution. *Board of Education v. Allen County*.....782, 786
24. ——— A statute prohibiting the maintenance of a clubroom where intoxicating liquors are received or kept for use as a beverage held to be within the title of an act relating to the "manufacture and sale" of such liquors, and to be valid. *The State v. Topeka Club* ..... 756
25. ——— In determining whether a statute is within the title of the act the title will be liberally interpreted for the purpose of upholding the law. *Id.*.....756, 760
26. ——— It is not necessary that the title contain every detail of the entire act. It will be sufficient if it fairly indicates, though in general terms, its scope and purpose. *Id.*.....756, 760
27. ——— Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the body of the act without violating the constitutional inhibition. *Id.* .....756, 761
28. **Uniform and equal rate of assessment.**—The resident owner of stock in a corporation organized and having its principal office in another state is required to list his stock for taxation, although all of

CONSTITUTIONAL LAW—CONTINUED:

- the capital of such corporation is invested in property which is taxed in this state. *Hunt v. Allen County* ..... 824
29. — Such taxation of such stock is not double taxation, and the statute authorizing it does not violate the constitutional provision for a uniform and equal rate of assessment and taxation. *Id.* ..... 825
- ✓ 30. **Vested rights—statute limiting time of bringing action.**—The statute requiring the purchaser of school land to sue to enforce his rights within six months after the act took effect is not void on the ground that it fails to give a reasonable time within which to begin such action. *Davis v. Nation* ..... 410

CONSTRUCTION—See CONTRACTS; MINES AND MINERALS; PLEADINGS; STATUTORY CONSTRUCTION; WILLS; TAXATION.

CONTEMPT:

1. **Accusation.**—Appellant could not object to the jurisdiction of the court in a contempt proceeding because no accusation had been filed, having filed an answer to the petition without objection. *Butler v. Butler*... 133
2. **Refusal to execute a deed.**—Where a husband was ordered to join with his wife in a conveyance of land adjudged to her in a divorce suit he was not in contempt for refusing to execute a warranty deed. *Id.*... 130
3. — Where a husband is ordered to join with his wife in executing a conveyance of her land upon her request he is not compelled to act until requested to do so by her or by some person authorized by her to make such request. *Id.* ..... 130
4. **Violation of injunction.**—Where a receiver was appointed for a corporation and interference with the property by creditors was enjoined the purchaser of a tax certificate did not become a creditor and was not barred from acquiring a tax deed. *Yurann v. Hamilton* ..... 528, 532

CONTRACTS:

See AGENCY; BONDS; CITIES AND CITY OFFICERS; COUNTIES; DEEDS; FENCES; INSURANCE; LANDLORD AND TENANT; MECHANIC'S LIEN; MINES AND MINERALS; MORTGAGES; NEGOTIABLE INSTRUMENTS; PARTNERSHIP; RAILROADS; SALES; SCHOOLS AND SCHOOL LAND; SURETYSHIP AND GUARANTY; TELEGRAPH COMPANIES.

Action *ex contractu* or *ex delicto*.—See ACTIONS AND REMEDIES.

Election of remedies or defenses.—See ACTIONS AND REMEDIES.

Evidence of breach of receiver's bond.—See BONDS, 15.

Joinder of causes of action.—See ACTIONS AND REMEDIES.

Oral agreements.—See FRAUD; SPECIFIC PERFORMANCE; INSURANCE, 7-9; MORTGAGES, 7.

Recovery of money paid.—See MONEY PAID.

Statute of frauds.—See FRAUD; SPECIFIC PERFORMANCE.

Statutes of limitation.—See LIMITATION OF ACTIONS.

1. **Abandonment—action to recover for part performed.**—Where, under a contract to drill several wells, payment of the cost of each well was due upon its completion, a refusal to pay for a completed well on the ground that nothing was due until all the wells

## CONTRACTS—CONTINUED:

- were completed entitled plaintiff to abandon further work and sue for that already done. *Bailey v. Gas Co.* ..... 746, 750
2. ——— Such an action is one upon the contract, and the statute of limitations applicable thereto is that relating to agreements in writing. *Id.* ..... 746, 751
3. ——— In an action on a severable contract, abandoned because defendant refused to pay for work done, the general finding for plaintiff implied a finding that nonpayment was the cause of the abandonment, although there was a special finding that operations ceased partly because plaintiff had trouble with its drillers. *Id.* ..... 752
4. **Acceptance of benefits by third party.**—A lease for more than one year, signed by one partner only, but made for the benefit of the firm, held also to obligate the partner who did not sign. *Marks v. Chumos.* ..... 562
5. ——— Where a written lease for more than one year was orally assigned by the lessee to a third party, who orally agreed with the lessor to comply with the terms of the contract, the lease was binding upon the assignee as if he had signed it. *Id.* ..... 562
6. ——— If a written contract executed by A and B be accepted by C, and acted upon by A and C, it becomes the contract of C as fully as if formally assigned to him. *Brick Co. v. Gas Co.* ..... 752
7. **Accord and satisfaction.**—See ACCORD AND SATISFACTION; BONDS, 3; SURETYSHIP AND GUARANTY, 6.
8. **Accrual of action.**—(See, also, No. 1; LIMITATION OF ACTIONS, 3; RAILROADS, 28.) Where a lessee deposits money as an advance payment of certain sums to become due under the lease from time to time, the lessor can not sue to recover any such sums which have become due so long as the deposit in his hands is large enough to discharge his claim. *Patton v. Hamilton* ..... 81
9. ——— Where an insurance contract provided for the appointment of appraisers in case of disagreement as to the amount of the loss, and that appraisal must precede an action on the policy, the insured could sue on the policy, after disagreement by the appraisers, without offering to appoint other appraisers. *Jerrils v. Insurance Co.* ..... 320
10. ——— Where full performance of a contract was prevented by the defendant an action for damages for the breach accrued immediately. *Gilbert v. Grubel* ..... 476, 479
11. **Arbitration and award.**—See INSURANCE, 2, 3; SALES, 17.
12. **Assignment.**—See Nos. 5, 6, 72; INSURANCE, 4, 5; SCHOOLS AND SCHOOL LAND, 2, 11, 12, 19.
13. **Cancellation.**—See Nos. 34-36, 70; DEEDS.
14. **Capacity of the parties.**—See DEEDS, 7, 8.
15. **Conclusiveness of finding that condition has been performed.**—The decision of the county board as to

## CONTRACTS—CONTINUED:

- whether a railway company had fulfilled the conditions of the contract so as to entitle it to the issuance of bonds voted held not conclusive. *Railroad Co. v. Scott County* .....804, 805
16. **Consideration.**—(See, also, No. 79; DEEDS, 10-14; SCHOOLS AND SCHOOL LAND, 1.) A deed void because the grantee knew of the grantor's insanity and paid only a nominal consideration did not revoke a will previously made by the grantor, and a devisee under the will had sufficient interest to maintain an action to cancel the deed, although there had been no disaffirmance of the deed or tender of the consideration paid by the grantee. *Hospital Co. v. Philippi*.....64, 68
17. ——— A deed executed by an insane person to one who knows of the grantor's mental incapacity and who gives no substantial consideration for the property is a nullity. *Id.*.....64, 68, 71
18. ——— Under the testimony and the general finding it was assumed that the trial court held there was no failure of consideration for a sale with a warranty. *Colean v. Johnson*.....657
19. ——— Where the owner of property assigned to his vendee an insurance policy containing a mortgage clause the original premium was sufficient consideration to sustain the policy in the hands of the assignee. *Funk v. Insurance Co.*.....525, 527
20. ——— Mutual promises held a sufficient consideration for negotiable paper. *Hawkins v. Windhorst*.... 522
21. ——— Where a purchaser of cattle gave a check as payment to the vendor, but afterward declined to receive the cattle, he could not, in an action by the payee on the check, defend on the ground that no cattle were received. *Id.*.....522
22. **Construction.**—(See, also, Nos. 8, 26-28, 50, 71, 74, 75, 77, 78.) An agreement to give notice of a claim for personal injuries is in the nature of a forfeiture and will be strictly construed. *Smith v. Railway Co.* 140
23. ——— A stipulation to renew an insurance contract on the same conditions as the existing contract held to include the essentials of a contract of indemnity, and not to refer to the methods by which the original contract was made. *Brown v. Insurance Co.*.....442
24. ——— The rule that a condition that a railroad is to be built for use within a specified time is to be reasonably construed applied. *Railroad Co. v. Scott County* .....801
25. ——— If a contract be fairly susceptible of two meanings, the general scope and purpose of the transaction and all the circumstances are to be considered in determining which meaning was intended. *Brick Co. v. Gas Co.*.....752, 754
26. **Definiteness.**—Where a memorandum described land as in a certain county and of a certain quantity, the description did not satisfy the statute of frauds, and a petition asking performance of the contract was de-

## CONTRACTS—CONTINUED:

- murrable, although it stated that defendant recently showed plaintiff a tract of the size mentioned, in the county referred to. *Hampe v. Sage*.....723, 730
27. ——— If the memorandum had stated that the land described was the tract recently shown to plaintiff by defendant proof that a particular tract had been so shown might have been permissible. *Id.*..... 731
28. ——— Parol evidence is admissible to apply a description, but not to supply it. *Id.*..... 733
29. **Disaffirmance.**—See No. 16.
30. **Duty of shipper to comply with conditions.**—A shipper of stock to whom free transportation is given must comply with the conditions of the contract, and is obliged to know whether he has time to examine his stock at stopping places and return to his place before the train proceeds. *Leslie v. Railway Co.*.....152, 156
31. **Execution of contract limiting common-law liability.**—Where a shipper used a contract under which defendant claimed the stock was shipped, in order to secure a return pass, he was held to have ratified the execution and signing of the contract, regardless of whether he authorized anyone to sign it for him. *Watt v. Railway Co.*..... 458
32. ——— In an action for injury to stock, whether the shipment was made under a written contract or the common law was a question of fact. *Id.*..... 458
33. **Fairness—agreement not unconscionable.**—Equity will not enforce an unconscionable contract; but the mere fact that one provision of a legal contract, or even the entire contract, is more favorable to one party than to the other does not ordinarily render it unconscionable. *Brick Co. v. Gas Co.*.....752, 755
34. **Forfeiture.**—(See, also, No. 22; BONDS, 3; INSURANCE, 1, 23, 24; SCHOOLS AND SCHOOL LAND.) The burden was upon a lessor who sought to cancel a lease because of the lessee's failure to drill wells to show that damages was not an adequate remedy. *Howerton v. Gas Co.*..... 367
35. ——— Having failed to make such showing, a decree for cancellation not sustained. *Id.*..... 368
36. ——— If it be determined that such a rule of damages can not be applied, an alternative decree may be entered requiring defendant within a fixed time to drill sufficient wells or that the lease be canceled. *Id.* .....368, 370
37. **Fraud.**—See FRAUD; DEEDS, 4, 5, 8; INSURANCE, 1, 22; NEGOTIABLE INSTRUMENTS, 4, 7.
38. **Implied.**—Plaintiff was entitled to foreclose a chattel mortgage or waive the conversion and sue on the implied contract to pay the value of the property sold. *Stewart v. Falkenberg* ..... 580
39. ——— One who in reliance upon an agreement had incurred expense could claim reimbursement, not under the contract, but from all the facts of the case. *Baldrige v. Centgraf*..... 244

## CONTRACTS—CONTINUED:

40. **Measure of damages for a breach.**—(See, also, Nos. 59, 67-69.) Where the sole question is whether plaintiff is entitled to recover on a contract, and there is no dispute concerning the amount, a verdict for half the amount claimed should be set aside as contrary to the evidence, at the instance of either party. *Bressler v. McVey* ..... 341
41. ——— Where after land was leased for crop rent and the tenant paid \$100 for the hay crop the landlord conveyed, warranting against encumbrances, the grantee was entitled to recover but \$100 for breach of warranty, having ratified the lease by accepting the landlord's share of the other crops. *Chase v. Barnes*, 28
42. ——— The measure of damages for the failure of the holder of a mineral lease to drill wells upon the premises stated. *Howerton v. Gas Co.* ..... 368, 369
43. ——— The measure of damages stated for the breach of an agreement by which plaintiff was to conduct a business until the profits amounted to a certain sum, when he was to be given a half interest in the business. *Gilbert v. Grubel* ..... 476, 482
44. **Merger—conditions superseded.**—A stipulation in a contract of sale to deliver a satisfactory abstract of title was not merged in a warranty deed and a purchase-money mortgage executed by the vendee contemporaneously with the contract. *Read v. Loftus*, 485, 490
45. ——— If a deed be accepted as performance of the conditions of the contract, it supersedes a stipulation as to title; but if the parties intend that the stipulation shall remain in effect, it will not be merged in the deed. *Id.* ..... 485
46. **Mistake as to remedy.**—A lessor held entitled to recover rent that accrued while an action by him to cancel the lease was pending. *Myers v. Shertzer* ..... 275
47. **Mistake of law.**—One who, under mistake of law, accepted stock of no value in part payment for his land had no recourse against the purchaser. *Cemetery Association v. Hanslip* ..... 27
48. **Notice of injury and claim for damages.**—(See, also, No. 22.) The failure to instruct as to effect of a stipulation respecting notice to a carrier of a claim for loss held not material where the carrier acquired notice in time and denied liability on other grounds than lack of demand. *Watkins v. Railway Co.* ... 308, 310
49. ——— A provision that an employee would give thirty days' notice of any claim for a personal injury sustained while in defendant's employ held to have been waived. *Smith v. Railway Co.* ..... 136, 139
50. **Offer and acceptance.**—A writing construed as an agreement for the exchange of lands and the payment in cash of the net difference between the agreed prices. *Hampe v. Sage* ..... 728, 730
51. ——— To constitute an accord and satisfaction, the agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must

## CONTRACTS—CONTINUED:

- have been entered into by the parties understandingly and with unity of purpose. *Matheney v. El Dorado* ..... 720, 722
52. ——— A parol contract to renew an existing contract of insurance is valid although no new policy is issued nor premium paid at the time of loss, providing a credit be given and payment of the premium is not a condition precedent. *Brown v. Insurance Co.*... 442
53. **Parol evidence.**—See EVIDENCE.
54. **Part performance.**—See FRAUD, 29, 30; SPECIFIC PERFORMANCE, 10-13.
55. **Party to be satisfied.**—Where title was to be made satisfactory to the vendee, in a suit by him to rescind the contract it was unnecessary for him to introduce in evidence the abstract furnished. *Read v. Loftus*.. 493
56. ——— Where parties agree that title shall be made satisfactory to the vendee the court is not called upon to determine the validity of objections made to the title. *Id.*..... 493
57. ——— The fact that before making a contract the vendee consulted an attorney concerning the title did not deprive him of the right to secure such guaranties and make such conditions concerning the title as the vendor was willing to concede. *Id.*..... 494
58. **Performance—evidence.**—In an action for the contract price by a builder it was not prejudicial error to allow plaintiff to say he had fully performed the contract, in view of the evidence and findings. *McCullough v. Hayde*..... 734
59. **Performance except in certain particulars.**—Where a building contract is substantially complied with, except in certain particulars, and a comparatively small expenditure will supply the omissions and remedy the defects, the measure of damages for such non-performance is the reasonable expense necessary to make the work conform to the contract. *Id.*..... 734, 737
60. **Performance prevented by one party.**—See No. 10.
61. **Pleading performance of conditions.**—Where a contract stipulated that a vendor might repurchase at an appraised value, a petition sufficiently alleged performance of the conditions respecting appraisement, in the absence of a motion to make more definite. *Wilber v. Ronnau*..... 171, 174
62. **Ratification.**—See Nos. 31, 41; AGENCY, 7-9, 11.
63. **Reasonableness of conditions.**—Regulations imposed upon a shipper accompanying stock to whom free transportation was given held reasonable. *Leslie v. Railway Co.*..... 152, 156
64. **Reformation.**—In an action to reform a chattel mortgage and enforce it there was no misjoinder of causes of action. *Stewart v. Falkenberg*..... 576, 579
65. ——— In an action to reform a chattel mortgage and recover the proceeds of the property from a third

## CONTRACTS—CONTINUED:

- party the mortgagors, having filed a disclaimer, were not necessary parties to an appeal by the defendant. *Id.* ..... 576, 578
66. — In an action to reform a chattel mortgage and enforce it by judgment against a third party for the proceeds of the sale of the property the mortgagors are proper defendants. *Id.* ..... 576, 579
67. **Rescission.**—(See, also, No. 55.) Upon the rescission of a contract the party not in default is entitled to recover necessary expenditures made upon the faith of the performance by the other party. *Read v. Loftus* ..... 494
68. — On the rescission of a contract by a vendee, who recovered his expenditures, the vendor was only entitled to rent as if the improvements had not been made. *Id.* ..... 494
69. — If the vendor had been charged with interest upon the expenditures he would have been entitled to rent on the property in its improved condition. *Id.* ... 495
70. — Retention of possession for a reasonable time in reliance on a vendor's promise to perfect title is not such proof of laches as will necessarily defeat a rescission of the contract. *Id.* ..... 485, 492
71. **Severable or entire—time of payment.**—(See, also, Nos. 1-3.) A written agreement to drill several wells, and if gas is found in paying quantities in any or all the wells defendant shall own such well or wells by paying the cost of drilling, implies that a payment is due whenever a paying well has been drilled. *Bailey v. Gas Co.* ..... 746, 748
72. **Signature.**—(See, also, Nos. 4, 5; BONDS, 1, 2.) The assignee of a policyholder who signed an application agreeing to accept the policy subject to the by-laws, a copy of the application being attached to the policy, was bound thereby, although the copy of the by-laws attached to the policy was not signed, as the statute requires. *Smith v. Insurance Co.* ..... 698, 703
73. **Specific performance.**—See SPECIFIC PERFORMANCE.
74. **Substantial compliance with conditions.**—(See, also, Nos. 24, 59, 76; EVIDENCE, 67.) Where a contract does not cover contingencies liable to occur it will be presumed the parties intended that, if an unexpected contingency arise, each will do what is just and fair under the circumstances. *Gilbert v. Grubel*.... 483
75. — A technical and literal interpretation of the contract which violates manifest justice will not be adopted. *Id.* ..... 483
76. **Time of performance.**—(See, also, No. 24.) A railway company, having substantially complied with the conditions of the contract within the time stated in the proposition submitted to the voters, was entitled to have the bonds that had been voted issued. *Railroad Co. v. Scott County* ..... 795, 801
77. — In determining whether time is of the essence of the contract equity looks further into the intention



## CONTRACTS—CONTINUED:

- of the parties to ascertain whether they in fact intended performance by the day named to be controlling. *Id.*..... 802
78. — Time will be deemed of the essence of the contract wherever the benefit to accrue from the consideration materially depends upon a strict performance in point of time. *Id.*..... 802
79. *Ultra vires*.—In an action by a cemetery association to cancel deeds executed to a stockholder, who was to transfer his stock to the association, the conveyances held void for want of consideration and because executed without authority. *Cemetery Association v. Hanslip* .....21, 25
80. *Waiver of conditions*.—(See, also, Nos. 22, 44, 45, 49, 70; SALES, 17; INSURANCE, 3, 23, 24.) Taking possession and improving property held not conclusive evidence of the waiver of an agreement to furnish satisfactory title. *Read v. Loftus*.....485, 492
81. — Whether a provision requiring notice of any claim for a personal injury was waived was a question of law. *Smith v. Railway Co.*..... 141
82. — Conditions of a contract forbidding a shipper of stock to board a moving train were waived by defendant's conductor; the shipper was not a mere licensee, and the carrier was liable for damages sustained by him. *Leslie v. Railway Co.*.....152, 157
83. *Warranties*.—(See, also, SALES, 41, 42.) A finding that the insured had not misrepresented his age in his application for membership in a fraternal insurance order held conclusive on review. *King v. Modern Woodmen* ..... 352
84. — Where a husband was ordered to join with his wife in a conveyance of land adjudged to her in a divorce suit he was not in contempt for refusing to execute a warranty deed. *Butler v. Butler*..... 130

## CONTRIBUTION—See SURETYSHIP AND GUARANTY.

## CONTRIBUTORY NEGLIGENCE—See PERSONAL INJURIES.

## CONVERSION:

1. *Dividend paid out of invested capital*.—Where a dividend is paid to a stockholder out of assets of a corporation the right to recover the amount as a payment made under a mutual mistake or upon the theory of a technical conversion discussed. *Mercantile Co. v. Stiefel* .....7, 11
2. *Guardian*.—A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly*..... 1
3. *Waiver*.—Plaintiff was entitled to foreclose a chattel mortgage or waive the conversion and sue on the implied contract to pay the value of the property sold. *Stewart v. Falkenberg*..... 580

**CONVEYANCES**—See **BANKRUPTCY**; **DEEDS**; **FRAUD**; **HOME-STEADS AND EXEMPTIONS**; **JUDICIAL SALES**; **SALES**; **SPECIFIC PERFORMANCE**; **TAXATION**; **WILLS**.

**CORONER'S WARRANT**—See **CRIMINAL LAW**.

**CORPORATIONS:**

See **INSURANCE**; **RAILROADS**; **TELEGRAPH COMPANIES**.

**Municipal**.—See **CITIES AND CITY OFFICERS**. See, also, **COUNTIES**; **SCHOOLS AND SCHOOL LAND**.

1. **Admissions by agent**.—See **EVIDENCE**, 50.
2. **Dividend paid out of invested capital**.—Where a dividend is paid to a stockholder out of assets the right to recover the amount as a payment made under a mutual mistake or upon the theory of a technical conversion discussed. *Mercantile Co. v. Stiefel*....7, 11
3. ——— Where a stockholder procures a dividend partly out of invested capital by fraudulently deceiving the directors as to the amount of surplus on hand he is liable to the corporation for the amount his share in the distribution was increased by the misrepresentation. *Id.*.....7, 8
4. ——— Where several stockholders unite in the perpetration of such a fraud they are liable jointly to the extent of the total excess received by all. *Id.*.....7, 14
5. ——— Where the participants in such fraud constitute a majority of the directors the situation is the same as though the conspirators, not being directors, had so misled the entire membership *Id.*.....7, 11
6. **Foreign**.—(See, also, Nos. 18, 19.) Under a general denial in a replevin action defendant may defeat a recovery by plaintiff by showing it is a foreign corporation and not entitled to maintain the action. *Colean v. Johnson* ..... 656
7. ——— A foreign corporation may maintain an action to enforce a mortgage on property in this state without being authorized to engage in business in the state. *Stewart v. Falkenberg*.....576, 579
8. **Franchises**.—See **CITIES AND CITY OFFICERS**, 12, 13.
9. **Knowledge of officer having a personal interest**.—(See, also, No. 12.) A corporation in dealing with one of its own officers, who acts for himself and not for it, is not chargeable with notice of facts known to him. *Bank v. Northup*..... 648
10. **Liability of stockholders**.—(See, also, Nos. 2-4, 16, 17.) Where corporate stock purporting to be fully paid was exchanged for property agreed to be worth a fixed amount, less than the face value of the stock, the shareholders were liable to corporate creditors as though they had procured such shares by a cash payment of the amount agreed upon as the value of the property exchanged. *Id.*.....638, 641
11. ——— Where upon the organization of a corporation nominally paid-up stock is issued at a discount the holders of such stock are ordinarily liable to

## CORPORATIONS—CONTINUED:

- creditors without notice for the difference between the amount paid for the stock and its face value. *Id.* .....638, 640
12. ——— Where the president of a corporation negotiated a loan for it from a bank, of which he was cashier, and did not communicate to other officers of the bank his knowledge that the corporation's stock, nominally paid up, was issued at a discount, his knowledge was not imputable to the bank and did not defeat its right to recover from the corporate shareholders to the extent to which they had not paid the face value of their stock. *Id.* .....639, 643
13. "Moneyed corporation."—A "moneyed corporation," within the meaning of the statute declaring one guilty of forgery who fraudulently makes false entries in the account book of such an association, defined. *The State v. Chance*..... 392
14. Power to issue or sell stock.—A cemetery association held to be a public and not a private corporation, and it had no authority to issue or sell stock. *Cemetery Association v. Hanslip*.....20, 23
15. Receiver — creditors enjoined — purchase at tax sale.—Where a receiver was appointed for a corporation and interference with the property by creditors was enjoined the purchaser of a tax certificate did not become a creditor and was not barred from acquiring a tax deed. *Yurann v. Hamilton*.....528, 532
16. Stock issued at a discount.—(See, also, Nos. 11, 12.) The holder of stock issued as fully paid up owes nothing to the corporation. *Bank v. Northrup*..... 642
17. Stock issued in exchange for property.—(See, also, No. 10.) Where corporate stock is issued in exchange for overvalued property, the overvaluation has been held to be evidence of fraud; if intentional, proof of it. *Id.*..... 641
18. Taxation—holder of stock.—The resident owner of stock in a corporation organized and having its principal office in another state is required to list his stock for taxation, although all of the capital of such corporation is invested in property which is taxed in this state. *Hunt v. Allen County*..... 824
19. ——— Such taxation of such stock is not double taxation, and the statute authorizing it does not violate the constitutional provision for a uniform and equal rate of assessment and taxation. *Id.*..... 825
20. *Ultra vires*.—(See, also, No. 14.) In an action by a cemetery association to cancel deeds executed to a stockholder, who was to transfer his stock to the association, the conveyances held void for want of consideration and because executed without authority. *Cemetery Association v. Hanslip*.....21, 25
- COST OF REDEMPTION**—See **TAXATION**, 13, 59, 63, 65, 68, 69.

**COSTS:**

1. **Custodian in replevin.**—In a replevin suit a custodian might have relieved himself from costs by filing a disclaimer or an offer to surrender possession. *Lemaster v. Fisher*..... 282
2. **Division—offer to confess judgment.**—Where the judgment was for more than the amount of an offer to confess judgment there was no reason for dividing the costs. *Matheney v. El Dorado*..... 725
3. **Liability of a county.**—A rehearing denied in an action to recover from a county fees claimed for official services in various actions and proceedings. *Gunning v. Wyandotte County*..... 219
4. ——— In an action to recover from a county the costs of prosecuting a prisoner paroled by the district court, the parole law held not to be invalid. *Mikesell v. Wilson County*..... 502, 506
5. ——— Where one sentenced to fine and imprisonment is pardoned by the governor, but is held for non-payment of costs, the district court may parole him and in six months thereafter may finally discharge him. *Id.*..... 502
6. ——— If the prisoner be unable to pay or give security for the costs they must be paid by the county, and liability therefor attaches one month after such release if the costs are not paid by defendant. *Id.* 502, 508
7. **Printing abstracts and briefs.**—The cost of printing unnecessary matter in the abstract of the record taxed to the appellant. *Bowland v. McDonald*..... 357
8. ——— The expense of printing abstracts and briefs held not taxable as costs unless a statement is filed within ten days after the case is decided. *McAfee v. Walker* ..... 355
9. ——— Costs not allowed for printing that part of a counter abstract which had already been printed in full in the abstract. *Mercantile Co. v. Stiefel*..... 7, 14
10. ——— Where omissions in the abstract of the record were cured by the counter abstract a motion to dismiss was denied, but the costs of the counter abstract were taxed to appellant. *Butler v. Butler*..... 132
11. **Transcript of the record.**—A stenographer's receipt attached to a transcript was a sufficient statement of the cost thereof. *McAfee v. Walker*..... 356

**COUNTER ABSTRACT**—See PRACTICE, SUPREME COURT, 2, 3.

**COUNTER CLAIM AND SET-OFF**—See DAMAGES.

**COUNTIES:**

See BONDS; ELECTIONS; HIGHWAYS; SCHOOLS AND SCHOOL LAND; TAXATION.

1. **Clerk of the district court—fees and salaries.**—The statute construed to give a clerk of the district court in a county of a given population all fees up to \$1400 per annum, and fees in excess of that amount are to be divided one-half to the clerk and one-half to the county. *Wolfe v. Lyon County*..... 516

## COUNTIES—CONTINUED:

2. **Coroner's warrant.**—See CRIMINAL LAW.
3. **County clerk.**—(See, also, No. 24; TAXATION.) An abbreviated acknowledgment of the execution of a tax deed by the county clerk held sufficient. *Less v. Yeats* ..... 105, 107
4. **County commissioners—compensation.**—(See, also, No. 13.) County commissioners may perform official services outside of board meetings, and a single member, acting for the board, may render lawful services as a commissioner and be paid the statutory compensation therefor. *The State v. Kennedy* ..... 373, 379
5. **County commissioners—compromise of taxes.**—A compromise tax deed of contiguous lots that had been sold separately was not void because the compromise did not include the taxes of the year in which it was made. *Less v. Yeats* ..... 105
6. ——— A claim that a compromise resolution had become dormant when the money was paid and the assignment executed not sustained, the presumption being that the order was made without any condition requiring it to be accepted within a certain time. *King v. Nilson* ..... 354
7. **County commissioners—conclusiveness of findings.**—The decision of the county board as to whether a railway company had fulfilled the conditions of the contract so as to entitle it to the issuance of bonds voted held not conclusive. *Railroad Co. v. Scott County* ..... 804, 805
8. **County commissioners—corruption in office.**—Corruption within the meaning of the statute authorizing the removal of a county commissioner from office defined. *The State v. Kennedy* ..... 373, 381
9. ——— In order that payment of excessive or illegal demands against a county may be corrupt the commissioner must have intended to violate his duty, misappropriate funds and secure to himself or another unlawful gain. *Id.* ..... 373, 381
10. ——— Payment of claims not sufficiently itemized, through a misinterpretation of the statute and in reliance upon the advice of the county attorney, did not constitute corruption. *Id.* ..... 374, 383
11. ——— The payment of unverified claims against a county, through inadvertence and without wrongful intent, did not constitute corruption. *Id.* ..... 374, 382
12. ——— In an action to remove a commissioner from office the burden of showing corruption rests upon the state. The law presumes honesty and good faith until the contrary is made to appear. *Id.* ..... 374, 382
13. ——— Record proof of the number of meetings a commissioner attended does not tend to prove that other services were not performed, or cast upon him the burden of justifying the receipt of more compensation than he was entitled to for attending board meetings. *Id.* ..... 374, 382

COUNTIES—CONTINUED:

14. **County commissioners—discretion—duty imposed by law.**—Where a legal duty is cast upon a board of county commissioners that duty may be enforced by mandamus, and such duty can not be evaded upon the ground that the county officials have a discretion to act. *School District v. Wilson County*.....806, 811
15. **County commissioners—equalization of taxes.**—A petition to enjoin the collection of a tax which charged that the commissioners knowingly fixed an exorbitant and grossly excessive valuation on plaintiff's property was not demurrable. *Salt Co. v. Ellsworth County* .....203, 205
16. **County commissioners—neglect or refusal to perform official duties.**—Irregularities in the publication of statements of sums of money allowed and in advertisements for bids for bridge repair work held not to be neglect of duty justifying the removal of a commissioner from office. *The State v. Kennedy*....375, 386
17. ——— Under the statute providing for the removal of a county officer who neglects or refuses to perform any act which it is his duty to perform, the duty must be personal and the act one which the officer has legal capacity and authority to perform. *Id.*....374, 384
18. ——— Failure to publish estimates of expenditures upon which tax levies were made and failure to advertise for bids for the repair of a bridge held not neglect of duty warranting the removal of a commissioner from office. *Id.*.....375, 385
19. **County commissioners—notice of defective bridge.**—See HIGHWAYS, 8-10.
20. **County commissioners—repair of county bridges.**—(See, also, Nos. 16, 18.) The duties and powers of county commissioners in repairing bridges at the expense of the county stated. *The State v. Kennedy* .....373, 377
21. **County commissioners—tax levy for high schools.**—The power of the county commissioners under the act of 1905 to levy taxes for the support of high schools is superseded by enactments of 1907 and 1909. *Board of Education v. Allen County*..... 786
22. ——— The duty of county commissioners to make a tax levy for the maintenance of high schools under the "Barnes law" stated. *Board of Education v. Allen County*..... 782  
*School District v. Wilson County*..... 806
23. **County court of Douglas county.**—See JURISDICTION, 3.
24. **Disposition of land not redeemed from tax sale.**—Where a county adopts the provisions of chapter 162, Laws 1891, and purchases land at tax sale, which remains unredeemed for three years, the commissioners may dispose of it for less than the legal charges, or it may be conveyed to anyone paying the legal charges, without the intervention of the commissioners. *Gibson v. Branstool*..... 59

## COUNTIES—CONTINUED:

25. ——— Where land purchased by a county at tax sale is not redeemed for three years and is disposed of for less than the legal charges six months must intervene between the date of the assignment of the certificate and the execution of the deed, but not otherwise. *Id.*..... 59
26. Liability for costs.—A rehearing denied in an action to recover from a county fees claimed for official services in various actions and proceedings. *Gunning v. Wyandotte County*..... 219
27. ——— Where one sentenced to fine and imprisonment is pardoned by the governor, but is held for non-payment of costs, the district court may parole him and in six months thereafter may finally discharge him. *Mikesell v. Wilson County*..... 502
28. ——— If the prisoner be unable to pay or give security for the costs they must be paid by the county, and liability therefor attaches one month after such release if the costs are not paid by defendant. *Id.*, 502, 508
29. ——— In an action to recover from a county the costs of prosecuting a prisoner paroled by the district court, the parole law held not to be invalid. *Id.*, 502, 506
30. Payment of excessive or illegal demands against a county.—See Nos. 4, 8-13.
31. Sheriff.—See ELECTIONS, 3; JUDICIAL SALES; PROCESS.
32. Tax levy—judicial notice.—A court may take judicial notice of a tax levied by the board of commissioners of the county in which the court is held upon all the taxable property in the county. *School District v. Wilson County*..... 806, 810

## COURTS:

See CONTEMPT; COSTS; DISBARMENT PROCEEDINGS; DISCRETIONARY MATTERS.  
 Collusive suits.—See JURISDICTION, 12.  
 County court of Douglas county.—See JURISDICTION, 3.  
 Determination of validity of a statute.—See STATUTORY CONSTRUCTION, 3.  
 District.—See PRACTICE, DISTRICT COURT.  
 Judicial notice.—See EVIDENCE.  
 Jurisdiction.—See JURISDICTION.  
 Justice of the peace.—See PRACTICE, JUSTICE OF THE PEACE.  
 Marshals of city courts.—See ELECTIONS, 4.  
 Probate.—See GUARDIAN AND WARD, 1; WILLS, 14; TRUSTS AND TRUSTEES, 1.  
 Receivers.—See BONDS; FEES AND SALARIES.  
 Referee.—See PRACTICE, DISTRICT COURT, 9-14.  
 Supreme.—See PRACTICE, SUPREME COURT.

CREDIT—See DAMAGES, 3; INSURANCE, 7.

## CRIMINAL LAW:

1. Appearance.—See BONDS.
2. Confessions.—(See, also, No. 6.) Exculpatory denials by one charged with crime were not admissions, and were not within the rule relating to confessions. *The State v. Turner*..... 789

## CRIMINAL LAW—CONTINUED:

3. **Coroner's warrant.**—See No. 21.
4. **Embezzlement.**—In the statute forbidding the embezzling by an officer of the state of money "belonging to such estate," the word "estate" is manifestly intended for "state" and must be so construed. *The State v. Radford*..... 853
5. **Evidence of another offense than the one charged.**—On a trial for uttering forged paper to cover a shortage evidence that the defendant forged other notes for the same purpose is competent. *The State v. Chance* .....389, 391
6. **Evidence procured by intimidation.**—(See, also, No. 23.) The rule excluding proof of an involuntary confession and that relating to self-incrimination held not to bar the admission of evidence procured by intimidation from one charged with murder. *The State v. Turner*.....787, 789
7. **Forgery.**—(See, also, No. 5.) A "moneyed corporation," within the meaning of the statute declaring one guilty of forgery who fraudulently makes false entries in the account book of such an association, defined. *The State v. Chance*..... 392
8. ——— A contention that an information did not sufficiently charge a forgery not sustained. *Id.*..... 389
9. ——— Affixing to a note a signature intended to be regarded as that of another person is not prevented from being forgery because the name is not correctly written. *Id.*..... 388
10. ——— Where the name "Heinis" is signed with the intention that it shall be supposed to be the signature of "Hein," it can not be said as a matter of law that the difference is so great as to prevent the deception of any person of ordinary prudence. *Id.*.....388, 390
11. **Homicide.**—(See, also, No. 6.) A homicide held not excusable because there was not an absence of "unlawful intent." *The State v. Brecount*.....195, 197
12. **Information or complaint.**—A contention that an information did not sufficiently charge a forgery not sustained. *The State v. Chance*..... 389
13. ——— A coroner's warrant for the arrest of a person found guilty by a coroner's jury takes the place of a complaint, and is sufficient authority for the holding of a preliminary examination before an examining magistrate. *The State v. Brecount*.....195, 199
14. ——— By leave of court an information may be amended in matter of substance as well as of form after a plea of not guilty has been entered and before the trial is begun. *The State v. Chance*.....389, 391
15. **Intention.**—See No. 11.
16. **Intoxicating liquors.**—See INTOXICATING LIQUORS.
17. **Pardon.**—See No. 19.
18. **Parole or discharge of prisoner—costs.**—In an action to recover from a county the costs of prosecuting



## CRIMINAL LAW—CONTINUED:

- a prisoner paroled by the district court, the parole law held not to be invalid. *Mikesell v. Wilson County*, 502, 506
19. — Where one sentenced to fine and imprisonment is pardoned by the governor, but is held for non-payment of costs, the district court may parole him and in six months thereafter may finally discharge him. *Id.*..... 502
20. — If the prisoner be unable to pay or give security for the costs they must be paid by the county, and liability therefor attaches one month after such release if the costs are not paid by defendant. *Id.* .....502, 508
21. Preliminary examination.—A coroner's warrant for the arrest of a person found guilty by a coroner's jury takes the place of a complaint, and is sufficient authority for the holding of a preliminary examination before an examining magistrate. *The State v. Brecount* .....195, 199
22. Sale of mortgaged chattels.—See MORTGAGES, 7.
23. Self-incriminating testimony.—(See, also, No. 6.) In a criminal action articles procured from defendant by force or coercion are admissible against him, so long as he has not been constrained by the court to produce them. *The State v. Turner*..... 793

CROPS—See DAMAGES, 14-16; SALES, 41.

CROSS-EXAMINATION—See EVIDENCE.

CROSSINGS—See PERSONAL INJURIES, 18.

CUSTODIAN—See REPLEVIN.

## D.

## DAMAGES:

- Accrual of action for a breach of a contract.—See CONTRACTS.
- Action by riparian owner for obstruction of stream.—See WATERS AND WATERCOURSES.
- Action for breach of receiver's bond.—See BONDS.
- Action for contribution.—See SURETYSHIP AND GUARANTY.
- Action for false imprisonment.—See FALSE IMPRISONMENT.
- Action for false representations.—See FRAUD.
- Action for injury by a mob.—See CITIES AND CITY OFFICERS.
- Action for injury by fire.—See RAILROADS.
- Action for injury by trespassing animals.—See TRESPASS AND TRESPASSERS.
- Action for injury caused by defects in highway.—See HIGHWAYS, 8-11.
- Action for injury to goods.—See RAILROADS.
- Action for injury to stock.—See RAILROADS.
- Action for injury to the person.—See PERSONAL INJURIES.
- Action for misfeasances of officers acting in governmental capacity.—See CITIES AND CITY OFFICERS, 12, 13.
- Action for removal of shade trees growing in streets.—See CITIES AND CITY OFFICERS, 14.
- Action on insurance contract.—See INSURANCE.
- Action to recover money paid.—See MONEY PAID.
- Adequacy of remedy in damages—breach of contract.—See CONTRACTS, 34-36.
- Assumption of risk.—See PERSONAL INJURIES.
- Condemnation proceedings.—See HIGHWAYS, 1.
- Contributory negligence.—See PERSONAL INJURIES.
- Joint wrongdoers.—See ACTIONS AND REMEDIES, 20, 21.
- Notice of injury and claim for damages.—See RAILROADS.
- Proximate cause.—See PERSONAL INJURIES.
- Respondet superior*.—See CITIES AND CITY OFFICERS, 12, 13.

## DAMAGES—CONTINUED:

1. **Aggravation or mitigation.**—In an action against a city for injury to the person and property of a saloon keeper by a mob the conduct and reputation of the plaintiff may be shown in mitigation of damages to the property. *Stevens v. Anthony*..... 179
2. **Attachment of money and notes.**—The measure of damages for the wrongful attachment of money and notes by way of garnishment is interest on the money and notes during the time they were held and the necessary expenses incurred in regaining possession of the property. *Dody v. Bank*..... 406
3. ——— Neither the loss of prospective profits in the general business of the owner nor injury to his credit are elements of damage. *Id.*..... 406
4. **Attorney's fees.**—See No. 31.
5. **Breach of contract.**—Upon the rescission of a contract the party not in default is entitled to recover necessary expenditures made upon the faith of performance by the other party. *Read v. Loftus*..... 494
6. ——— Where plaintiff had substantially complied with an agreement by which he was to conduct a business until the profits aggregated a certain sum, when he was to be given half the business, in an action for a breach by the defendant a claim that the plaintiff was permitted to establish his case by secondary and incompetent evidence not sustained. *Gilbert v. Grubel*..... 476, 480
7. ——— The measure of damages stated for the breach of an agreement by which plaintiff was to conduct a business until the profits amounted to a certain sum, when he was to be given a half interest in the business. *Id.*..... 476, 482
8. ——— The measure of damages for the failure of the holder of a mineral lease to drill wells upon the premises stated. *Howerton v. Gas Co.*..... 368, 369
9. ——— Where a building contract is substantially complied with, except in certain particulars, and a comparatively small expenditure will supply the omissions and remedy the defects, the measure of damages for such nonperformance is the reasonable expense necessary to make the work conform to the contract. *McCullough v. Hayde*..... 734, 737
10. ——— The statute does not forbid evidence of an oral contract for the sale of real estate to be given for any purpose consistent with the statute. *Baldridge v. Centgraf*..... 243
11. ——— One who in reliance upon such an agreement has incurred expense may claim reimbursement, not under the contract, but from all the facts of the case. *Id.*..... 244
12. ——— Where after land was leased for crop rent and the tenant paid \$100 for the hay crop the landlord conveyed, warranting against encumbrances, the grantee was entitled to recover but \$100 for breach of

## DAMAGES—CONTINUED:

- warranty, having ratified the lease by accepting the landlord's share of the other crops. *Chase v. Barnes*.. 28
18. Counter claim and set-off.—See Nos. 33, 34.
14. Destruction of, or injury to, growing crops.—The measure of damages for injury to, or the destruction of, growing crops stated. *Sayers v. Railway Co.*, 123, 126
15. ——— In ascertaining the damages for injury to a growing crop a liberal rule as to proof of the value at the time and place of the loss should be applied. *Id.*, 128
16. ——— A landlord who is to receive crop rent may maintain an action for injury to the growing crop without joining the tenant, but can only recover to the extent of his share. *Id.*.....123, 124
17. Direct or remote.—See No. 3.
18. Excessive or inadequate award.—Special findings examined and found not to be without support in the evidence nor contrary to the instructions of the court, and not inconsistent with the general verdict. *Walters v. Railway Co.*.....739, 743
19. ——— A claim that the judgment was for a larger amount than the evidence justified not sustained. *Marks v. Chumos*..... 564
20. ——— In an action for the negligent delivery of a telegram the evidence held to warrant exemplary damages, and an award of \$700 held not excessive. *Hollingsworth v. Telegraph Co.*..... 472
21. ——— Where the sole question is whether plaintiff is entitled to recover on a contract, and there is no dispute concerning the amount, a verdict for half the amount claimed should not be received, and should be set aside as contrary to the evidence, at the instance of either party. *Bressler v. McVey*..... 341
22. Exemplary.—(See, also, No. 20.) Statements by an automobile driver made after an accident, showing a disregard of plaintiff's rights, tended to show malice and warranted a recovery of punitive damages. *Martin v. Garlock* .....266, 268
23. Expenses and expenditures.—See Nos. 2, 5, 9, 31, 33.
24. Future or permanent disability.—The allegations of the petition in an action for personal injuries were sufficient to present to the jury the question of future disability. *Fugua v. Railroad Co.*..... 815
25. ——— Where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries. *Barbour v. Rosedale*..... 218
26. Injury to credit.—See No. 3.
27. Interest.—See Nos. 2, 34.
28. Loss of profits.—See No. 3.
29. Loss of time.—See No. 31.
30. Rent.—See Nos. 33, 34.
31. Replevin.—Where a successful defendant in replevin brought an action for damages on the replevin bond,

**DAMAGES—CONTINUED:**

- loss of time, attorney's fees and expenses incurred in defending the replevin action were not recoverable, in the absence of malice or bad faith in bringing the replevin action. *Lake v. Hargis*..... 711
82. ——— The word "damages," as used in a replevin bond, refers to damages that may be occasioned to the defendant by the detention of the property and by its loss if not returned when a return is adjudged. *Id.*, 714
33. **Rescission of contract.**—(See, also, No. 5.) On the rescission of a contract by a vendee, who recovered his expenditures, the vendor was only entitled to rent as if the improvements had not been made. *Read v. Loftus* ..... 494
34. ——— If the vendor had been charged with interest upon the expenditures he would have been entitled to rent on the property in its improved condition. *Id.*... 495
35. **Special damages.**—See No. 24.
36. **Statutory damages—maximum rate law.**—Damages recoverable by a shipper under the law fixing maximum rates for the transportation of oil do not constitute a fine for the breach of a penal law. *Tucker v. Railway Co.*.....222, 224
37. ——— The legislature may segregate oil from other commodities and make its transportation the subject of special regulation, and to secure observance of such regulation may impose special penalties. *Id.*.....222, 224
38. **Value of land sold to purchaser in reliance on a judgment.**—A defendant in a suit to quiet title who was served only by publication and who had the judgment vacated after the land had been sold to an innocent purchaser held entitled to a judgment against the plaintiff for its value. *Smith v. Land Co.*..... 539

**DEATH**—See EVIDENCE, 78; GUARDIAN AND WARD, 1; INSURANCE, 19; PROCESS, 12; TAXATION, 40-42.

**DECEIT**—See FRAUD.

**DEEDS:**

- Acceptance—condition of contract of sale waived.—See SALES, 6, 7.
- Grantee dead when tax deed was executed.—See TAXATION, 40-42.
- Refusal to execute.—See CONTEMPT.
1. **Cancellation.**—(See, also, No. 6.) In an action against a grantee's heirs to cancel a deed the extent of the adjudication as against a claim of an indebtedness discussed. *Cemetery Association v. Hanslip*.... 27
2. ——— An action by a devisee of a valid will to cancel a deed the testator was fraudulently procured to execute when he was of unsound mind is equitable in character, and neither party is entitled to a jury trial. *Hospital Co. v. Philippi*.....64, 68
3. ——— Where, before a will was probated, a devisee sued to cancel a deed executed by the testator, but after probate filed an amended and supplemental petition, on which the cause was tried, an objection that

## DEEDS—CONTINUED:

- the action was prematurely brought became immaterial. *Id.*.....64, 68
4. ——— A deed void because the grantee knew of the grantor's insanity and paid only a nominal consideration did not revoke a will previously made by the grantor, and a devisee under the will had sufficient interest to maintain an action to cancel the deed, although there had been no disaffirmance of the deed or tender of the consideration paid by the grantee. *Id.*.....64, 68
5. ——— A petition asking that a deed be canceled because of the mental incapacity of the grantor and the undue influence exercised upon him stated only a single cause of action. *Id.*.....65, 71
6. **Consideration.**—(See, also, Nos. 8, 10-14.) In an action by a cemetery association to cancel deeds executed to a stockholder, who was to transfer his stock to the association, the conveyances held void for want of consideration and because executed without authority. *Cemetery Association v. Hanslip*.....21 25.
7. **Insane persons.**—(See, also, Nos. 3-5.) Evidence held sufficient to uphold a finding that a grantor was without mental capacity to execute a deed. *Hospital Co. v. Philippi*.....65, 73.
8. ——— A deed executed by an insane person to one who knows of the grantor's mental incapacity and who gives no substantial consideration for the property is a nullity. *Id.*.....64, 68, 71
9. **Quitclaim.**—A purchaser in reliance upon a judgment rendered upon publication service held to be a purchaser in good faith, although there was a quitclaim deed in his chain of title. *Smith v. Land Co.*... 539.
10. ——— The holder of a quitclaim deed who failed to show that he paid a valuable consideration had no standing to claim a benefit from the failure of a prior grantee of the same grantor to record his conveyance. *Doty v. Bitner*..... 551
11. **Record.**—(See, also, No. 10.) Where a conveyance is not recorded a second purchaser from the same grantor, to be protected by the recording act, must show that he paid a valuable consideration. *Kruse v. Conklin*.....358, 362  
*Doty v. Bitner*.....551, 552
12. ——— Recitals in the conveyance of the payment of consideration are not evidence against strangers. *Kruse v. Conklin*.....358, 362  
*Doty v. Bitner*.....551, 552
13. ——— Upon proof of the payment of a valuable consideration the presumption arises that the second purchaser acted in good faith and without notice. *Kruse v. Conklin*.....358, 363  
*Doty v. Bitner*.....551, 552
14. ——— An unrecorded conveyance of real estate is good except as against one purchasing without notice

## DEEDS—CONTINUED:

- and for a valuable consideration. *Kruse v. Conklin* ..... 358, 362
15. ——— In an action of ejectment a demurrer to the defendant's evidence was improperly sustained. *Hughes v. Delautre*..... 548
16. Tax deed.—See TAXATION.
17. Undue influence.—See No. 5.
18. Warranty.—(See, also, DAMAGES, 12.) Where a husband was ordered to join with his wife in a conveyance of land adjudged to her in a divorce suit he was not in contempt for refusing to execute a warranty deed. *Butler v. Butler*..... 130

## DEFAULT—See JUDGMENTS.

## DEMAND—See REPLEVIN, 7; AGENCY, 2.

## DEMURRER—See EVIDENCE; PLEADINGS; PRACTICE, SUPREME COURT, 34.

## DEPARTURE—See PLEADINGS.

## DESCENTS AND DISTRIBUTIONS—See TAXATION, 40, 41.

## DESCRIPTION OF LAND—See CITIES AND CITY OFFICERS, 3; SPECIFIC PERFORMANCE, 1, 2; PROCESS, 15.

## DISAFFIRMANCE—See CONTRACTS.

## DISBARMENT PROCEEDINGS:

1. Facts requiring disbarment.—The evidence and findings held to authorize and require the revocation of the license of the accused to practice law in this state. *In re Washington*..... 829

## DISCLAIMER—See PARTIES; REPLEVIN, 4.

## DISCRETIONARY MATTERS:

1. Amendment of pleadings.—Refusal to allow an answer to be amended was not an abuse of discretion. *McCullough v. Hayde*..... 734
2. Consolidation of actions.—Refusal to permit the consolidation of the action with another action, in which a third party was interpleaded, was not an abuse of discretion. *Id.*..... 734
3. Employee.—See PERSONAL INJURIES, 46.
4. Forfeiture of appearance bond.—Where one charged with a misdemeanor is released on bond and at the time set for trial appears by attorney only it is within the discretion of the justice of the peace to proceed with the trial or to forfeit the bond. *The State v. Johnson*..... 450
5. Laches.—Where, by reason of long lapse of time, there is a possible loss of testimony or increased difficulty of defense, the doctrine may be applied in the discretion of the court; but laches does not consist in mere lapse of time. *Harris v. Deffenbaugh* ..... 766, 770

## DISCRETIONARY MATTERS—CONTINUED:

6. **Municipal authority—ordinance or resolution.**—Although a statutory direction that certain steps shall be taken by ordinance leaves no discretion in the city council as to methods, it is competent for the council by resolution to direct officers in charge of grading a street not to cut down shade trees growing therein until such action shall have been authorized by the council. *Remington v. Walthall*.....234, 238
7. **Municipal officers—removal of shade trees.**—An arbitrary decision by a city officer, not made in good faith, that shade trees growing in a street are a nuisance, when they are not and there is no necessity for cutting them down, is no protection to an officer who cuts them down when an action is brought against him by the abutting owner to recover for their loss. *Id.*..... 234
8. **Performance of duty imposed by law.**—See **MANDAMUS**.
9. **Quo warranto.**—The court has discretion in quo warranto proceedings, and is not obliged to deprive an official of his office on account of irregularities, although not sanctioning his conduct. *The State v. Kennedy* ..... 388
10. **Receivers—compensation.**—The compensation of receivers, when payment shall be made, and from what funds, is largely discretionary with the court, and it was not an abuse of discretion to order plaintiff's claim paid before that of the receiver. *Bank v. Varner* .....692, 696
11. **Specific performance.**—Whether courts shall decree specific performance always rests in their sound judicial discretion. *McNutt v. Nellans*..... 428
12. **Taxation.**—(See, also, **BONDS**, 7.) The decision of the tax commission equalizing the assessment of property is final when honestly, although erroneously, made. *Salt Co. v. Ellsworth County*.....203, 205
13. ——— The fact that the commission does not obtain the best evidence of value or adopt the best plan in estimating the value does not entitle plaintiff to an injunction. *Id.* ..... 206
14. ——— The duty of county commissioners to make a tax levy for the maintenance of high schools under the "Barnes law" stated.  
*Board of Education v. Allen County*..... 782  
*School District v. Wilson County*..... 806
15. ——— The "rock road law" vests discretion in the county commissioners to determine whether an improvement shall be made, and the act does not delegate power to the petitioners. *Hill v. Johnson County* .....813, 816

DISCRIMINATION—See **RAILROADS**.DISMISSAL OF ACTION—See **ACTIONS AND REMEDIES**.DISTRICT COURT—See **PRACTICE, DISTRICT COURT**.

**DIVIDENDS**—See **CORPORATIONS**.

**DIVORCE AND ALIMONY:**

See **CONTEMPT**, 2, 3.

1. **Alimony—foreign divorce decree.**—(See, also, No. 5.) A foreign divorce decree barred the recovery of alimony in this state, although alimony was not awarded nor specifically referred to in the decree. *McCormick v. McCormick*.....32, 49
2. **Alimony—venue of action.**—The plaintiff in a suit for alimony need not be a resident of the state or of any county of the state. *Id.*.....31, 52
3. ——— The suit may be commenced in any county where defendant may be summoned, or where he has property subject to appropriation to pay the judgment if he be a nonresident. *Id.*.....31, 52
4. **Judgment—foreign.**—(See, also, No. 1.) The act of 1907 makes the enforcement of foreign divorce decrees based on publication service obligatory in this state, and places such decrees on the same basis as judgments of the courts of this state. *Id.*.....32, 43
5. ——— A foreign decree in a divorce suit was not open to collateral attack on the ground of fraud in a suit for alimony in Kansas. *Id.*.....32, 39
6. **Judgment—jurisdiction.**—A court had jurisdiction to hear a divorce suit even if the allegations of the petition were false, and to render a decree even if moved to do so by false testimony. *Id.*.....32, 36

**DOCUMENTS—LOST OR DESTROYED**—See **HIGHWAYS**, 7; **JUDGMENTS**, 35.

**DOUGLAS COUNTY COURT**—See **JURISDICTION**, 3.

**DUE PROCESS OF LAW**—See **CONSTITUTIONAL LAW**.

**DUES**—See **INSURANCE**.

**DURESS**—See **CRIMINAL LAW**, 23.

## E.

**EJECTMENT:**

1. **Lien for taxes.**—See **TAXATION**.
2. **Mortgagee in possession—mortgage barred by limitation.**—The fact that a mortgagee in possession could not enforce his mortgage because it was barred by limitation did not give the mortgagor the right to a judgment quieting title or for possession, the mortgage debt not having been satisfied. *Capell v. Dill*.. 652
3. **Plaintiff's rights as a purchaser.**—In an action of ejectment a demurrer to the defendant's evidence was improperly sustained. *Hughes v. Delautre*..... 548
4. **Suit to enjoin defendants in possession.**—A tax-deed holder held not entitled to an injunction against defendants holding possession under the government title. *Baker v. Lane*.....715, 719

**ELECTION OF REMEDIES**—See **ACTIONS AND REMEDIES**; **SCHOOLS AND SCHOOL LAND**, 6.



## ELECTIONS:

See QUO WARRANTO, 2, 3.

1. **Bonds in aid of railroads.**—(See, also, No. 3.) The statutory provision for calling a second election to vote upon a railroad-aid bond proposition does not limit the number of elections that may be called. *Railroad Co. v. Scott County*.....795, 806
2. ——— The word “second” in such statute means “another.” *Id.* .....795, 806
3. **Notice—errors in sheriff’s proclamation—election not void.**—Errors in the first publication of a sheriff’s proclamation of an election to vote upon a railroad-bond proposition held to be formal defects and not to render the election void. *Id.*.....795, 805
4. **Qualified voters.**—Marshals of city courts (Laws 1905, ch. 193) are not “city officers,” and women are not “qualified voters” in the election of such marshals. *Fee v. Richardson*.....190, 192
5. **Tax levy—county high schools.**—See SCHOOLS AND SCHOOL LAND, 6.

EMBEZZLEMENT—See CRIMINAL LAW.

EMINENT DOMAIN—See HIGHWAYS, 1.

EMPLOYER AND EMPLOYEE—See PERSONAL INJURIES; AGENCY.

ENCUMBRANCES—See DAMAGES, 12.

EQUALIZATION—See TAXATION.

EQUAL PROTECTION OF THE LAW—See CONSTITUTIONAL LAW.

ERASURE—See NEGOTIABLE INSTRUMENTS, 1; WILLS, 22.

## ESTOPPEL:

Acceptance of benefits.—See CONTRACTS, 4-6, 31.

Acquisition of tax title by a tenant.—See LANDLORD AND TENANT, 1.

Admissions.—See EVIDENCE; PLEADINGS.

Assumption of risk.—See PERSONAL INJURIES.

Contributory negligence.—See PERSONAL INJURIES.

Election of remedies.—See ACTIONS AND REMEDIES.

Forfeiture of school land.—See SCHOOLS AND SCHOOL LAND, 16.

Issue tried but not pleaded.—See PLEADINGS, 2.

Laches.—See ACTIONS AND REMEDIES.

Misinterpretation of a statute.—See CITIES AND CITY OFFICERS, 4.

Mistake as to remedy.—See MINES AND MINERALS, 10.

Neglect to use a method provided by law for levying taxes.—See SCHOOLS AND SCHOOL LAND, 6.

Ratification.—See AGENCY, 7-9, 11; DAMAGES, 12.

*Res judicata.*—See JUDGMENTS.

## EVIDENCE:

1. **Admissibility under pleadings.**—See PLEADINGS, 3-6.
2. **Admissions.**—(See, also, Nos. 35, 50; PLEADINGS, 2.) An abandoned pleading has some evidentiary force in the nature of an admission, and should be received in evidence for what it is worth. *Watt v. Railway Co.* .....459, 461
3. ——— On an appeal from an award of damages allowed by the commissioners for the establishment of a highway evidence of the prior establishment

**EVIDENCE—CONTINUED:**

- of the highway is inadmissible. *Nelson v. Butler County* ..... 364
4. ——— The holder of a tax deed was concluded by his admission of ownership of the property when the deed was issued. *Matthewson v. Hevel*..... 135
5. **Aggravation or mitigation of damages.**—See No. 34.
6. **Bill of exceptions.**—(See, also, Nos. 73, 74.) A bill of exceptions was signed too late. *Newton v. Toevs*, 18
7. **Burden of proof and presumptions.**—(See, also, Nos. 69, 71, 72; CONTRACTS, 74; TAXATION, 3, 57, 63, 68, 70.) In replevin by a mortgagee of chattels, where the defense was that plaintiff lacked capacity to sue and that the property was exempt, the burden of proof was upon the defendant. *Colean v. Johnson*, 655
8. ——— In an action under the factory act what proof is necessary to establish liability in the first instance stated. *Caspar v. Lewin*..... 605, 635
9. ——— Plaintiff need not prove the practicability of providing safeguards to the machinery. *Id.*.... 605, 635
10. ——— The presumption that everyone knows the law does not extend so far as to make one guilty of fraud who asserts that to be the law which a court of last resort has declared to be otherwise. *Wagner v. Beadle* ..... 471
11. ——— In an action to remove a commissioner from office the burden of showing corruption rests upon the state. The law presumes honesty and good faith until the contrary is made to appear. *The State v. Kennedy* ..... 374, 382
12. ——— The burden was upon a lessor who sought to cancel a lease because of the lessee's failure to drill wells to show that damages was not an adequate remedy. *Howerton v. Gas Co.*..... 367
13. ——— Where a conveyance is not recorded a second purchaser from the same grantor, to be protected by the recording act, must show that he paid a valuable consideration.  
*Kruse v. Conklin*..... 358, 362  
*Doty v. Bitner*..... 551, 552
14. ——— Upon proof of the payment of a valuable consideration the presumption arises that the second purchaser acted in good faith and without notice.  
*Kruse v. Conklin*..... 358, 363  
*Doty v. Bitner*..... 551, 552
15. ——— The burden of proof rested upon an indorsee to establish his ownership of a note, but not to prove that he purchased in good faith and without notice of fraud. *Bank v. Abmeyer*..... 283, 285
16. ——— An oral admonition, after the jury's deliberations had begun, relating to the burden of proof held not to be reversible error. *Karner v. Railroad Company* ..... 842

## EVIDENCE—CONTINUED:

17. — The presumption that the holder of negotiable paper indorsed in blank is the owner was not destroyed by the erasure of a prior indorsement made by the payee. *King v. Bellamy*..... 301
18. — Generally where a mutilated will is found among the testator's effects the presumption arises that the mutilation was his own act, done with a revoking purpose. *Sellards v. Kirby*..... 298
19. — The fact that a will was written by the testator's daughter, who was named as a beneficiary, did not raise a presumption of undue influence. *Id.* ..... 291, 294
20. — Nor did it make a case for the application of the statutory provision that a will written by a principal beneficiary and confidential agent can not be held valid unless it be affirmatively shown that the testator knew its contents and had independent advice. *Id.* ..... 291, 296
21. — The connection of the subject matter of separate sheets of paper, the last one being signed, was sufficient to establish *prima facie* the identity of the other sheets as parts of a will. *Id.*..... 291, 293
22. — While it was presumed that an employee was properly performing his duty when injured, the same presumption applied to the employer in respect to furnishing safe appliances. *Duncan v. Railway Co.* ..... 230, 234
23. — To find a fact by presumption the inference should be a logical deduction, and reasonably certain in the light of all other proper presumptions and of all collateral facts. *Id.*..... 230, 233
24. — In an action by the beneficiary of a member of a fraternal insurance order who had disappeared and had not been heard from for more than seven years a judgment for the plaintiff was affirmed. *Farington v. Modern Woodmen*..... 841
25. — The evidence held sufficient to make a *prima facie* case in favor of plaintiff in an action to recover a real-estate broker's commission. *Putnam v. King*.. 216
26. — Where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries. *Barbour v. Rosedale*..... 213
27. — When facts are proved which the statute makes *prima facie* evidence of negligence the question whether such *prima facie* case is overthrown by defendant's testimony is one of fact. *Manley v. Railway Co.* ..... 211
28. — Notations in a book in which school-land sales are recorded held *prima facie* evidence that a purchaser's contract was forfeited at the date stated. *Walrond v. Noyes*..... 118
29. — In a personal-injury action by an employee plaintiff must show that the injury occurred through

**EVIDENCE—CONTINUED:**

- the omission of some duty by the master, which was the proximate cause of the injury. *Pilgrim v. Verdigris* ..... 114
30. ——— In order to foreclose a mortgage against a defendant who does not claim under the mortgagor the plaintiff must show that the mortgagor had title to the property, so that the mortgage created a lien. *Cooper v. Rhea* ..... 109, 113
31. **Circumstantial.**—(See, also, No. 48.) The testimony justified the inference that an engineer was killed by being struck by the girder of a bridge while leaning out of the cab window taking a signal in the line of duty, although no one saw the girder of the bridge strike his head. *Cloud v. Railway Co.* ..... 851, 852
32. **Collateral—proof of another offense than the one charged.**—On a trial for uttering forged paper to cover a shortage evidence that the defendant forged other notes for the same purpose is competent. *The State v. Chance* ..... 389, 391
33. **Competent against one defendant—another held not liable.**—Certain testimony held proper to be considered in support of a charge of a fraudulent purpose and conspiracy, although one of the defendants was found to be free from guilty knowledge. *Bank v. Hart* ..... 398, 401
34. **Conduct and reputation.**—In an action against a city for injury to the person and property of a saloon keeper by a mob the conduct and reputation of the plaintiff may be shown in mitigation of damages to the property. *Stevens v. Anthony* ..... 179
35. **Confessions.**—(See, also, No. 47.) Exculpatory denials by one charged with crime were not admissions, and were not within the rule relating to confessions. *The State v. Turner* ..... 789
36. **Conflicting.**—See Nos. 45, 46, 86; PRACTICE, SUPREME COURT, 7-13.
37. **Contrary to the physical facts.**—Evidence examined and the physical facts held not shown to be such as to authorize a reviewing court to say that the story told by plaintiff's witnesses was false. *Sheppard v. Storage Co.* ..... 509
38. ——— To justify an appellate court in setting aside a verdict supported by some evidence, on the ground that it is contrary to the undisputed physical facts, the inconsistency between the verdict and the facts must be conclusively demonstrated. *Id.* ..... 509
39. **Cross-examination.**—It was not error to restrict the evidence to the issues made. *McCullough v. Hayde*.. 734
40. **Defenses provable under a general denial.**—Under a general denial in a replevin action defendant may defeat a recovery by plaintiff by showing it is a foreign corporation and not entitled to maintain the action. *Colean v. Johnson* ..... 656

## EVIDENCE—CONTINUED:

41. ——— It is the Kansas rule and practice that in replevin cases every defense, general or special, meritorious or technical, may be made under a general denial. *Id.* ..... 658
42. Demurrer.—(See, also, No. 29.) In an action of ejectment a demurrer to the defendant's evidence was improperly sustained. *Hughes v. Delautre.* ..... 548
43. ——— Evidence showing knowledge by the chairman of the county board of the defective condition of the bridge where plaintiff was injured held sufficient as against a demurrer. *Mosier v. Butler County.* ..... 708
44. ——— On a demurrer to the evidence the court can only determine whether there is any evidence fairly tending to prove every essential fact necessary to a recovery. *The State v. White.* ..... 781
45. ——— In considering a demurrer to the evidence the court may not reconcile conflicting testimony or determine the weight of the evidence. *Stiles v. Valley Township* ..... 849
46. Direction of verdict.—(See, also, No. 86.) In an action by the trustee of a bankrupt to recover a payment as a preference, where it appeared by the undisputed facts that the creditor had reasonable cause to believe that the debtor was insolvent and intended a preference, it was not error to direct a verdict for plaintiff. *Shale v. Bank.* ..... 649
47. Evidence procured by intimidation.—(See, also, No. 76.) The rule excluding proof of an involuntary confession and that relating to self-incrimination held not to bar the admission of evidence procured by intimidation from one charged with murder. *The State v. Turner* ..... 787, 789
48. Findings of fact.—(See, also, No. 23.) Where there is no substantial evidence, direct or circumstantial, tending to prove a material fact, a finding that it exists can not be sustained. *Duncan v. Railway Co.* ... 230
49. Fraud.—Where corporate stock is issued in exchange for overvalued property, the overvaluation has been held to be evidence of fraud; if intentional, proof of it. *Bank v. Northup.* ..... 641
50. Hearsay.—Testimony that after an accident defendant's foreman said it was his fault and he had neglected his duty was hearsay. *Pilgrim v. Verdigris* ..... 114, 117
51. Immaterial error.—See Nos. 58-60, 67.
52. Interest of a witness.—See Nos. 77, 87.
53. Judgment—evidence against surety of receiver's default.—The finding and order of the court as to payment and distribution of the fund, made in the action in which a receiver was appointed, was evidence against a surety to show a breach of the conditions of the receiver's bond. *Bank v. Varner.* 692, 695
54. Judicial notice.—(See, also, PRACTICE, SUPREME COURT, 37, 38.) A court may take judicial notice of a

**EVIDENCE—CONTINUED:**

- tax levied by the board of commissioners of the county in which the court is held upon all the taxable property in the county. *School District v. Wilson County* ..... 806, 810
55. **Malice—statements made after accident.**—Statements by an automobile driver made after an accident, showing a disregard of plaintiff's rights, tended to show malice and warranted a recovery of punitive damages. *Martin v. Garlock* ..... 266, 268
56. **Memory of a witness.**—The fact that a witness testifies from memory to matters occurring thirteen years prior affects the credibility of the testimony but not its competency. *Walrond v. Noyes* ..... 121
57. **Motive or intention.**—See No. 77.
58. **Opinions and conclusions.**—(See, also, No. 77.) Plaintiff's opinion as to the speed of an automobile was improperly excluded; but the error was rendered immaterial by explicit findings that he failed to exercise due care and that defendant was not negligent. *Himmelwright v. Baker* ..... 569
59. ——— It was not material error to refuse to permit a physician to give his opinion as to the sanity of a person. *Hospital Co. v. Philippi* ..... 72
60. ——— In an action for the contract price by a builder it was not prejudicial error to allow plaintiff to say he had fully performed the contract, in view of the evidence and findings. *McCullough v. Hayde* .... 734
61. **Oral agreement.**—The statute does not forbid evidence of an oral contract for the sale of real estate to be given for any purpose consistent with the statute. *Baldridge v. Centgraf* ..... 243
62. **Parol or extrinsic.**—(See, also, No. 71.) If a contract be fairly susceptible of two meanings, the general scope and purpose of the transaction and all the circumstances are to be considered in determining which meaning was intended. *Brick Co. v. Gas Co.* ..... 752, 754
63. ——— Parol evidence is admissible to apply a description, but not to supply it. *Hampe v. Sage* ..... 733
64. ——— The jurat is evidence that an oath was administered, and in the absence of a jurat the fact may be proved by evidence *aliunde*. *James v. Logan*, 285, 288
65. ——— Where the return of service of notice of a proceeding to forfeit a school-land contract was defective parol evidence was admissible to show that the service was sufficient. *Walrond v. Noyes* .... 118, 121
66. **Perjury.**—See JUDGMENTS, 14, 18.
67. **Primary or secondary.**—(See, also, No. 82.) Where plaintiff had substantially complied with an agreement by which he was to conduct a business until the profits aggregated a certain sum, when he was to be given half the business, in an action for a breach by the defendant a claim that the plaintiff was permitted to establish his case by secondary and incompetent evidence not sustained. *Gilbert v. Grubel*, 476, 480

## EVIDENCE—CONTINUED:

68. ——— Where the issue was as to the width of an established road, and the records had been destroyed, secondary evidence that the road had been established and recognized as a sixty-foot road was admissible. *Bowland v. McDonald*. . . . . 84
69. ——— Where proceedings are attacked as void, and the record is shown to have been lost or destroyed, secondary evidence may be considered, and every reasonable presumption in support of the validity of the proceedings should be entertained. *Brumbaugh v. Wilson* . . . . . 53, 57
70. **Privileged matters.**—See No. 59.
71. **Record.**—(See, also, Nos. 28, 68.) The act of 1907 permitting parol evidence of service and making certain records *prima facie* evidence of a valid forfeiture of school land was intended to operate retroactively, and is not void for that reason. *Walrond v. Noyes* . . . . . 119, 120
72. ——— The tax rolls held *prima facie* evidence that the person in whose name land was assessed was the owner in an action to annul a tax deed issued to him. *Matthewson v. Hevel*. . . . . 136
73. **Referee—review.**—The procedure to obtain a review by the trial court of evidence taken before a referee stated. *Newton v. Toevs*. . . . . 15, 19
74. ——— Evidence taken before a referee but not brought before the district court can not be reviewed by the supreme court to determine whether it supports the findings. *Id.*. . . . . 15, 19
75. **Review.**—See PRACTICE, SUPREME COURT.
76. **Self-incriminating testimony.**—(See, also, No. 47.) In a criminal action articles procured from defendant by force or coercion are admissible against him, so long as he has not been constrained by the court to produce them. *The State v. Turner*. . . . . 793
77. **Testimony by a witness as to his state of mind.**—Where the motive or belief of a person is material, and he is a competent witness to prove such condition, he may testify to it directly in connection with his testimony detailing the circumstances and situation in which he was acting. *Bowers v. Railway Co.* . . . . . 95, 101
78. **Transactions with persons since deceased.**—A witness is not incompetent to testify to transactions with persons since deceased where the adverse party is the assignee of the administrator of an estate. *Stewart v. Falkenberg* . . . . . 576, 579
79. **Value of growing crops at time and place of injury.**—In ascertaining the damages for injury to a growing crop a liberal rule as to proof of the value at the time and place of the loss should be applied. *Sayers v. Railway Co.*. . . . . 128
80. **Value of property assessed.**—The officers are not required to value land containing salt deposits as if it

**EVIDENCE—CONTINUED:**

- were agricultural land, nor by the quantity of salt mined during the preceding year. *Salt Co. v. Ellsworth County* ..... 206
81. ——— The commission may avail itself of any information it can obtain that will enable it to make a just estimate of the actual value. *Id.*..... 206
82. ——— The fact that the commission does not obtain the best evidence of value or adopt the best plan in estimating the value does not entitle plaintiff to an injunction. *Id.*..... 206
83. **Weight and credibility.**—(See, also, Nos. 37, 44-46, 86.) Whether a charge of fraud is sustained by positive proof is for the trial court to determine; on review the only inquiry is whether the finding is supported by substantial evidence. *Mercantile Co. v. Stiefel* ..... 7, 13
84. ——— Where in an equitable proceeding a jury is called to answer special questions, the court may adopt their findings or ignore them and make answers of its own, based upon an independent consideration of the testimony. *Hospital Co. v. Philippi*..... 64, 68
85. ——— The fact that a witness testifies from memory to matters occurring thirteen years prior affects the credibility of the testimony but not its competency. *Walrond v. Noyes*..... 121
86. **Withdrawal of conflicting testimony from jury.**—Where the determination of a question of fact necessitates the consideration of all the evidence, which is conflicting, it is error to direct the jury's attention to a small portion of the evidence and instruct them to find for plaintiff if such evidence establishes the fact. *Schick v. Warren*..... 90
87. **Witnesses to prove execution of a will.**—The statute making void a devise to a witness to a will which can not be proved without his testimony applies only to attesting witnesses. *Sellards v. Kirby*..... 291, 293

**EXCEPTIONS:**

Bill of.—See EVIDENCE, 6, 73, 74.

Referee's report.—See PRACTICE, DISTRICT COURT, 12-14.

**EXCESSIVE DAMAGES—See DAMAGES.****EXECUTIONS:**

See LIMITATION OF ACTIONS, 15.

1. **Equitable interest—purchaser of school land.**—A holder of a certificate to school land, having paid part of the purchase price, was the equitable owner of the land. *Robertson v. Howard*..... 588
2. ——— His equitable interest in such land was real estate, and as such was subject to sale on execution. *Id.* ..... 588
3. **Supersedeas.**—See BONDS, 17.



**EXECUTORS AND ADMINISTRATORS:**See **GUARDIAN AND WARD**, 1; **WILLS**.

1. **Assignee of administrator—evidence.**—A witness is not incompetent to testify to transactions with persons since deceased where the adverse party is the assignee of the administrator of an estate. *Stewart v. Falkenberg* ..... 576, 579
2. **Claims against estate.**—Where the contract which created a trust compels a beneficiary to rely upon the trustee's personal liability, the beneficiary may maintain an action at law against the trustee or his administrator to recover a debt matured by the terms of the contract. *O'Neil v. Epting* ..... 245

**EXEMPLARY DAMAGES**—See **DAMAGES**.**EXEMPTIONS**—See **HOMESTEADS AND EXEMPTIONS**.**EXPENSES AND EXPENDITURES**—See **COUNTIES**, 16, 18; **DAMAGES**, 2, 3, 5, 9, 11, 31-34; **INSURANCE**, 13; **MANDAMUS**, 9, 10; **WILLS**, 15-17.**EXTRINSIC EVIDENCE**—See **EVIDENCE**, 62-65.**F.****FACTORY ACT**—See **PERSONAL INJURIES**.**FALSE IMPRISONMENT:**

1. **Authority of officer.**—A marshal appointed, confirmed and sworn had authority to arrest on view, without a warrant, although no commission had been issued and he had not subscribed to the oath. *Morrison v. Pence* ..... 420, 422
2. **Pleadings—grounds for arrest.**—In an action for false imprisonment the failure of the officer's answer justifying the arrest to state the offense and the grounds for the arrest was not material, plaintiff being fully informed as to the nature of the charge and the cause of his arrest. *Id.* ..... 420, 422

**FALSE REPRESENTATIONS**—See **FRAUD**, 9-18.**FEES AND SALARIES:**

1. **Assistant attorney-general.**—In an action against a county by an assistant attorney-general to recover fees for prosecutions under the prohibitory law a motion to make a petition more definite was properly denied. *Mikesell v. Wilson County* ..... 502, 505
2. **Attorneys.**—(See, also, **DAMAGES**, 31; **LIMITATION OF ACTIONS**, 11.) A claim of error admitting testimony of the amount paid attorneys not sustained. *Heneks v. Young* ..... 860, 861
3. **Clerk of the district court.**—The statute construed to give a clerk of the district court in a county of a given population all fees up to \$1400 per annum, and fees in excess of that amount are to be divided one-half to the clerk and one-half to the county. *Wolfe v. Lyon County* ..... 516

## FEES AND SALARIES—CONTINUED:

4. **County commissioners.**—County commissioners may perform official services outside of board meetings, and a single member, acting for the board, may render lawful services as a commissioner and be paid the statutory compensation therefor. *The State v. Kennedy* ..... 373, 379
5. ——— Record proof of the number of meetings a commissioner attended does not tend to prove that other services were not performed, or cast upon him the burden of justifying the receipt of more compensation than he was entitled to for attending board meetings. *Id.* ..... 374, 382
6. **Judicial officers.**—A rehearing denied in an action to recover from a county fees claimed for official services in various actions and proceedings. *Gunning v. Wyandotte County* ..... 219
7. **Receivers.**—The compensation of receivers, when payment shall be made, and from what funds, is largely discretionary with the court, and it was not an abuse of discretion to order plaintiff's claim paid before that of the receiver. *Bank v. Varner* ..... 692, 696

## FELLOW SERVANTS—See PERSONAL INJURIES.

## FENCES:

1. **Injury by trespassing animals.**—One who failed to keep up a portion of a division fence in accordance with an agreement could not recover for injury by trespassing animals under the statute forbidding the owner of such animals to permit them to run at large. *McAfee v. Walker* ..... 182, 184
2. ——— The distinction between failing to "confine" animals and permitting them to "run at large" discussed. *Id.* ..... 185
3. **Oral agreement—partition fence.**—An oral agreement by adjoining landowners that each should maintain one-half of a division fence held enforceable. *Id.* ..... 182, 183

## FINDINGS:

Conclusiveness.—See PRACTICE, SUPREME COURT.  
 Conclusiveness on trial court.—See PRACTICE, DISTRICT COURT, 6.  
 Conclusiveness—performance of conditions.—See CONTRACTS, 15.  
 Included in general findings.—See JUDGMENTS, 12; JURY AND JURORS, 12.  
 Presumptions.—See EVIDENCE, 23.  
 Referee.—See PRACTICE, DISTRICT COURT, 12-14.  
 Special.—See JURY AND JURORS.

## FINES AND PENALTIES:

Failure to furnish cars.—See RAILROADS, 13-16.  
 Maximum rate law.—See RAILROADS, 33, 41, 45.

## FIRE—See RAILROADS, 31.

## FIRE INSURANCE—See INSURANCE.

## FLOODS AND FRESHETS—See WATERS AND WATER-COURSES.

**FORECLOSURE**—See MORTGAGES; MECHANIC'S LIEN; JUDICIAL SALES, 4.

**FOREIGN CORPORATIONS**—See CORPORATIONS.

**FOREIGN JUDGMENTS**—See JUDGMENTS.

**FORFEITURE**—See BONDS; CONTRACTS; INSURANCE; OFFICE AND OFFICERS; SCHOOLS AND SCHOOL LAND.

**FORGERY**—See CRIMINAL LAW.

**FRANCHISES**—See CITIES AND CITY OFFICERS, 12, 13.

**FRATERNAL INSURANCE**—See INSURANCE.

# **FRAUD:**

See BANKRUPTCY; DISBARMENT PROCEEDINGS.

Admissions.—See PLEADINGS, 2.

Corruption in office.—See OFFICE AND OFFICERS.

False entries in account books of "moneyed corporations."—See CRIMINAL LAW, 7.

Good faith of official acts.—See CITIES AND CITY OFFICERS, 14.

Good faith of purchasers.—See SALES, 26-40.

Payment of illegal or excessive demands against a county.—See COUNTIES.

1. **Agent.**—A husband was his wife's agent, and she was answerable for the fraud which he committed while acting within the scope of his authority. *Mercantile Co. v. Stiefel*.....7, 14
2. **Alteration of writings.**—The presumption that the holder of negotiable paper indorsed in blank is the owner was not destroyed by the erasure of a prior indorsement made by the payee. *King v. Bellamy*... 301
3. — Where a testator signed a will below the attestation clause, but when offered for probate the signature had been partially erased, and his name written above such clause, apparently by himself, the will was properly admitted to probate. *Sellards v. Kirby* .....292, 297
4. **Appraisement of school land—undervaluation.**—In an action to set aside the appraisement of school land and cancel the certificate of purchase the evidence was insufficient to sustain the charge of fraudulent undervaluation. *The State v. White*..... 777
5. **Collusive proceeding.**—Where an officer refuses to perform an act which he believes the statute requires, because of a doubt and because he wishes an early decision by a court, a proceeding by the state to compel such action is not fictitious. *The State v. Dolley* .....533, 537
6. **Deeds.**—A deed executed by an insane person to one who knows of the grantor's mental incapacity and who gives no substantial consideration for the property is a nullity. *Hospital Co. v. Philippi*....64, 68, 71
7. **Joint wrongdoers.**—See No. 10.
8. **Judgment.**—See JUDGMENTS.
9. **Misrepresentations.**—(See, also, No. 1.) Where a stockholder procures a dividend partly out of invested capital by fraudulently deceiving the directors as to the amount of surplus on hand he is liable to

FRAUD—CONTINUED:

- the corporation for the amount his share in the distribution was increased by the misrepresentation. *Mercantile Co. v. Stiefel*.....7, 8
10. ——— Where several stockholders unite in the perpetration of such a fraud they are liable jointly to the extent of the total excess received by all. *Id.*, 7, 14
11. ——— Where the participants in such fraud constitute a majority of the directors the situation is the same as though the conspirators, not being directors, had so misled the entire membership. *Id.*.....7, 11
12. ——— A finding that the insured had not misrepresented his age in his application for membership in a fraternal insurance order held conclusive on review. *King v. Modern Woodmen*..... 352
13. ——— Ignorance of the ill health of a delinquent member does not prevent the acceptance by an insurance society of the amount he is in arrears from effecting a reinstatement, in the absence of fraudulent representations or concealment. *Mosiman v. Benefit Association* .....671, 674
14. ——— The rule that the public records furnished constructive notice of fraud so as to set the statute of limitations in motion held not applicable to a vendor who innocently relied upon false representations made by the vendee respecting the state of the record. *Hutto v. Knowlton*..... 445
15. ——— When false representations are actionable stated. *Bank v. Hart*.....398, 400
16. ——— In an action for fraudulent misrepresentation the petition stated a single cause of action. *Id.* .....398, 400
17. ——— Certain testimony held proper to be considered in support of a charge of a fraudulent purpose and conspiracy, although one of the defendants was found to be free from guilty knowledge. *Id.*...398, 401
18. ——— The failure to surrender notes given for money obtained by fraudulent representations was not a prerequisite to an action for damages for such representations. *Id.* .....398, 402
19. Notice.—(See, also, No. 14.) The record of a judgment annulling a grantor's title but voidable on the ground of fraud held to be notice to a purchaser from the time of the perpetration of the fraud. *Duphorne v. Moore*.....159, 161
20. ——— An action to set aside a judgment based on a willfully false affidavit for publication service must be brought in two years after actual or constructive notice of the fraud. *Id.*.....159, 161
21. ——— The burden of proof rested upon an indorsee to establish his ownership of a note, but not to prove that he purchased in good faith and without notice of fraud. *Bank v. Abmeyer*.....283, 285
22. ——— A judgment quieting title held not void, although based on a tax deed void on its face. *Smith v. Land Co.*..... 539

## FRAUD—CONTINUED:

23. ——— When false representations are actionable stated. *Bank v. Hart*.....398, 400
24. ——— The fraud for which a judgment may be set aside must be actual fraud, involving intentional wrong, as distinguished from legal or constructive fraud. *Wagner v. Beadle*..... 468
25. ——— A decree quieting title, rendered upon publication service and without actual notice, can not after three years be set aside as fraudulent merely by showing that plaintiff's title was based solely upon a defective tax deed. *Id.*..... 469
26. ——— A junior lienholder in default was entitled to have a judgment vacated because, after examining the pleadings and deciding his interests were not affected, the pleadings were amended in a material matter without his knowledge or consent. *Beekman v. Trower* ..... 327
27. **Oral agreement.**—(See, also, SPECIFIC PERFORMANCE.) Where a written lease for more than one year was orally assigned by the lessee to a third party, who orally agreed with the lessor to comply with the terms of the contract, the lease was binding upon the assignee as if he had signed it. *Marks v. Chumos* ..... 562
28. ——— A lease for more than one year, signed by one partner only, but made for the benefit of the firm, held also to obligate the partner who did not sign. *Id.* ..... 562
29. ——— The statute does not forbid evidence of an oral contract for the sale of real estate to be given for any purpose consistent with the statute. *Baldrige v. Centgraf* ..... 243
30. ——— One who in reliance upon such an agreement has incurred expense may claim reimbursement, not under the contract, but from all the facts of the case. *Id.* ..... 244
31. ——— An oral agreement by adjoining landowners that each should maintain one-half of a division fence held enforceable. *McAfee v. Walker*.....182, 183
32. ——— Where land was leased for crop rent, the tenant paying cash in advance for the landlord's share of the hay, the transaction was a lease and not within the statute of frauds. *Chase v. Barnes*..... 30
33. **Overvaluation of property for which corporate stock is issued.**—Where corporate stock is issued in exchange for overvalued property, the overvaluation has been held to be evidence of fraud; if intentional, proof of it. *Bank v. Northup*..... 641
34. **Preferential payment.**—See BANKRUPTCY.
35. **Presumption—knowledge of the law.**—The presumption that everyone knows the law does not extend so far as to make one guilty of fraud who asserts that to be the law which a court of last resort has declared to be otherwise. *Wagner v. Beadle*..... 471

**FRAUD—CONTINUED:**

36. **Proof.**—(See, also, No. 33.) Whether a charge of fraud is sustained by positive proof is for the trial court to determine; on review the only inquiry is whether the finding is supported by substantial evidence. *Mercantile Co. v. Stiefel*.....7, 13
  37. **Taxation.**—If an assessment is fraudulently made, or is so out of proportion to the actual value as to give reasonable assurance of a dishonest valuation, the enforcement of the tax may be enjoined. *Salt Co. v. Ellsworth County* ..... 205.
  38. ——— A petition to enjoin the collection of a tax which charged that the commissioners knowingly fixed an exorbitant and grossly excessive valuation on plaintiff's property was not demurrable. *Id.*....203, 205
  39. **Unconscionable contract.**—Equity will not enforce an unconscionable contract; but the mere fact that one provision of a legal contract, or even the entire contract, is more favorable to one party than to the other does not ordinarily render it unconscionable. *Brick Co. v. Gas Co.*.....752, 755
  40. **Undue influence.**—A petition asking that a deed be canceled because of the mental incapacity of the grantor and the undue influence exercised upon him stated only a single cause of action. *Hospital Co. v. Philippi* .....65, 71
  41. ——— The fact that a will was written by the testator's daughter, who was named as a beneficiary, did not raise a presumption of undue influence. *Selards v. Kirby*.....291, 294
  42. **Unfair competition.**—See TRADE-MARKS.
- FREIGHT TRAINS**—See PERSONAL INJURIES, 15, 16.

**G.**

**GARNISHMENT**—See ATTACHMENT.

**GENERAL DENIAL**—See PLEADINGS.

**GIFTS**—See WILLS.

**GOVERNOR—PARDON**—See COSTS, 5.

**GROWING CROPS**—See DAMAGES, 14-16; SALES, 41.

**GUARANTY**—See SURETYSHIP AND GUARANTY.

**GUARDIAN AND WARD:**

1. **Action against deceased guardian's surety.**—A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly*, 1
2. **Arrival at majority—abatement of action.**—The fact that a minor became of age after judgment in an action brought by his guardian did not abate the appeal by the guardian. *Id.*.....1, 4

## H.

HEALTH—See INSURANCE, 1, 23, 24.

HEARSAY—See EVIDENCE.

HEIRS—See PROCESS, 13.

HERD LAW—See FENCES.

HIGH SCHOOLS—See SCHOOLS AND SCHOOL LAND, 3-6.

## HIGHWAYS:

Cost of street improvement.—See CITIES AND CITY OFFICERS, 3, 4.  
 Injury to traveler—automobiles.—See PERSONAL INJURIES, 55;  
 DAMAGES, 22.  
 Railway crossing.—See PERSONAL INJURIES, 18.

1. **Appeal from award—evidence of prior establishment.**—On an appeal from an award of damages allowed by the commissioners for the establishment of a highway evidence of the prior establishment of the highway is inadmissible. *Nelson v. Butler County*... 364
2. **Approach of a bridge.**—The wooden approach is as much a part of a bridge as the steel structure. *Mosier v. Butler County*..... 709
3. **Defective bridge—proximate cause of injury.**—Notwithstanding the frightening of his horses plaintiff's injury would not have resulted if the guard rail of a bridge had not been defective. *Id.*..... 709
4. **Establishment—damages—estoppel.**—One who objected to the establishment of a 40-foot road, but claimed damages, was not thereby estopped to assert that the road was not legally established. *Bowland v. McDonald*..... 84, 89
5. **Establishment—existing road not vacated.**—Where a 60-foot road established on a section line has not been vacated the commissioners can not grant a petition establishing a 40-foot road on the same line. *Id.*..... 84, 88
6. **Establishment—legislative act.**—The act of 1887 declaring all section lines in certain counties to be public highways did not establish such highways. It required action by proper authorities to open the roads to public use. *Id.*..... 86, 87
7. **Establishment—secondary evidence.**—Where the issue was as to the width of an established road, and the records had been destroyed, secondary evidence that the road had been established and recognized as a 60-foot road was admissible. *Id.*..... 84
8. **Notice of defect in a bridge.**—Evidence showing knowledge by the chairman of the county board of the defective condition of the bridge where plaintiff was injured held sufficient as against a demurrer. *Mosier v. Butler County*..... 708
9. ——— Knowledge of the defective condition of the bridge at the exact spot where it gave way is not required. *Id.*..... 710

**HIGHWAYS—CONTINUED:**

10. ——— Actual knowledge of the defect is the same as actual notice. *Id.*..... 710
11. ——— Whether a township trustee had notice of defects in a culvert was a question of fact. *Stiles v. Valley Township*..... 849
12. **Repair of bridges.**—See COUNTIES, 16, 18, 20-22.
13. **Rock road law—validity.**—The statute known as the "rock road law" is not unconstitutional on the ground that it delegates legislative power to the petitioners. *Hill v. Johnson County*..... 813, 816
14. ——— Nor for the reason that the act contains no express provision for notice to property owners before the special assessments become a tax upon their property. *Id.*..... 813, 819
15. ——— Nor because it gives the county board authority to tax one-fourth of the cost of the improvement upon the township through which the road runs. *Id.*..... 813, 820

**HOMESTEADS AND EXEMPTIONS:**

1. **Burden of proving mortgaged property was exempt.**—In replevin by a mortgagee of chattels, where the defense was that plaintiff lacked capacity to sue and that the property was exempt, the burden of proof was upon the defendant. *Colean v. Johnson*... 655
2. **Conveyance—joint consent.**—In an action to recover purchase money the defendant, who with his wife executed a deed and asked specific performance, was estopped to claim the contract was void because the land was a homestead and the wife did not join in the contract. *McNutt v. Nellans*..... 424, 428

**HOMICIDE—See CRIMINAL LAW.**

**HUSBAND AND WIFE:**

See DIVORCE AND ALIMONY; CONTEMPT, 2, 3; HOMESTEADS AND EXEMPTIONS.

1. **Agency.**—A husband was his wife's agent, and she was answerable for the fraud which he committed while acting within the scope of his authority. *Mercantile Co. v. Stiefel*..... 7, 14
2. **Wife's separate estate—mechanic's lien.**—The mechanic's lien statute does not authorize a personal judgment against a wife for the price of material furnished to her husband under a contract with him and used by him in improving her property. *Garrett v. Loftus* ..... 556, 558
3. ——— The statute allowing a lien on a married woman's real estate for material furnished her husband and used in improving it does not violate the constitutional provision respecting married women's rights to possess property apart from their husbands, nor conflict with the statutory provision that the separate estate of a married woman shall not be subject to the disposal of her husband or liable for his debts. *Id.*..... 556



## I.

**IDEM SONANS**—See PROCESS, 11.

**IMPRISONMENT**—See FALSE IMPRISONMENT.

**IMPROVEMENTS**—See DAMAGES, 5, 33, 34; MECHANIC'S LIEN; SALES, 8; SPECIFIC PERFORMANCE, 10; SCHOOLS AND SCHOOL LAND, 19.

**INFANTS**—See GUARDIAN AND WARD; PARENT AND CHILD; TAXATION, 35.

**INFORMATION**—See CRIMINAL LAW.

**INJUNCTION:**

1. **Adequate remedy at law.**—A tax-deed holder held not entitled to an injunction against defendants holding possession under the government title. *Baker v. Lane* ..... 715, 719
2. **Continuance in force by appeal.**—Where a party who obtained a temporary injunction was defeated on the final hearing, the injunction was not continued in force by his appeal. *Brown v. Wilkerson*..... 553
3. **Mandatory.**—A claim that quo warranto would not lie to determine the right to an office because plaintiff had an adequate remedy by mandamus or mandatory injunction not sustained. *Fee v. Richardson*... 191
4. **Taxation.**—Plaintiff is not entitled to enjoin a tax because his property was valued higher than similar property, if the valuation be not excessive. *Salt Co. v. Ellsworth County*..... 206
5. ——— A petition to enjoin the collection of a tax which charged that the commission knowingly fixed an exorbitant and grossly excessive valuation on plaintiff's property was not demurrable. *Id.*... 203, 205
6. ——— The fact that the commission does not obtain the best evidence of value or adopt the best plan in estimating the value does not entitle plaintiff to an injunction. *Id.* ..... 206
7. ——— If an assessment is fraudulently made, or is so out of proportion to the actual value as to give reasonable assurance of a dishonest valuation, the enforcement of the tax may be enjoined. *Id.*..... 205
8. ——— The decision of the tax commission equalizing the assessment of property is final when honestly, although erroneously, made. *Id.*..... 203, 205
9. **Temporary.**—See No. 2.
10. **Trade-marks.**—A manufacturer who, to designate his goods, has adopted a name or device not subject to appropriation as a trade-mark may still be protected in its use from unfair competition if the circumstances warrant it. *Mill Co. v. Kramer*..... 684
11. **Violation of order.**—See CONTEMPT.

## INSANE PERSONS:

1. **Deeds.**—See **DEEDS**.
2. **Proof of insanity.**—Evidence held sufficient to uphold a finding that a grantor was without mental capacity to execute a deed. *Hospital Co. v. Philippi* ..... 65, 73
3. ——— It was not material error to refuse to permit a physician to give his opinion as to the sanity of a person. *Id.*..... 72

**INSOLVENCY**—See **BANKRUPTCY**; **COSTS**, 6; **GUARDIAN AND WARD**, 1; **SURETYSHIP AND GUARANTY**, 5.

**INSPECTION OF MINES**—See **PERSONAL INJURIES**, 34.

## INSTRUCTIONS:

1. **Admonition to jury—duty to agree.**—An oral admonition, after the jury's deliberations had begun, relating to the burden of proof, held not to be reversible error. *Karner v. Railroad Company*..... 842
2. ——— An admonition to the jury presenting to them in strong language their duty to agree if possible held not to constitute error. *Id.*..... 842
3. **Applicability to the issues.**—The failure to instruct as to effect of a stipulation respecting notice to a carrier of a claim for loss held not material where the carrier acquired notice in time and denied liability on other grounds than lack of demand. *Watkins v. Railway Co.*..... 308, 310
4. ——— Where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries. *Barbour v. Rosedale*..... 213
5. ——— An allegation that plaintiff did not believe she would ever recover from her injuries held equivalent to saying that the injuries were permanent. *Id.*.... 213
6. **Immaterial error.**—(See, also, Nos. 1, 2, 4, 11.) An instruction authorizing a recovery if plaintiff's injury was caused by defendant's negligence, without contributory negligence by plaintiff, was not materially erroneous for omitting to state that defendant's negligence must have been the proximate cause of an injury that ought to have been foreseen. *Martin v. Garlock*..... 266
7. ——— An instruction defining the duty of a master to furnish a safe place to work held not materially erroneous because the qualifying words "exercise ordinary care" were omitted. *Kamera v. Boiler Works* ..... 432
8. **Instructed verdict.**—(See, also, No. 12.) In an action by the trustee of a bankrupt to recover a payment as a preference where it appeared by the undisputed facts that the creditor had reasonable cause to believe that the debtor was insolvent and intended a preference, it was not error to direct a verdict for plaintiff. *Shale v. Bank*..... 649

## INSTRUCTIONS—CONTINUED:

9. **Law of the case—duty of jury to follow.**—Special findings examined and found not to be without support in the evidence nor contrary to the instructions of the court, and not inconsistent with the general verdict. *Walters v. Railway Co.*.....739, 748
10. **Requested instruction substantially given.**—In an action for negligence the refusal to give a requested instruction was not error, in view of the instructions given. *McGee v. McAuliff*..... 210
11. **Waiver.**—An instruction relating to the doctrine of the “last clear chance” was sufficient, plaintiff having failed to request a proper instruction. *Himmelwright v. Baker* .....569, 571
12. **Withdrawal of conflicting testimony from jury.**—Where the determination of a question of fact necessitates the consideration of all the evidence, which is conflicting, it is error to direct the jury’s attention to a small portion of the evidence and instruct them to find for plaintiff if such evidence establishes the fact. *Schick v. Warren*..... 90

## INSURANCE:

1. **Acceptance of delinquent dues — reinstatement.**—(See, also, Nos. 23, 24.) Ignorance of the ill health of a delinquent member does not prevent the acceptance by an insurance society of the amount he is in arrears from effecting a reinstatement, in the absence of fraudulent representations or concealment. *Mosiman v. Benefit Association*.....671, 674
2. **Appraisalment — prerequisite to action on the policy.**—Where an insurance contract provided for the appointment of appraisers in case of disagreement as to the amount of the loss, and that appraisalment must precede an action on the policy, the insured could sue on the policy, after disagreement by the appraisers, without offering to appoint other appraisers. *Jerrils v. Insurance Co.*..... 320
3. ——— Where an insurance policy required appraisalment as a prerequisite to action on the policy it was proper, under the pleadings, for plaintiff to show the appointment of appraisers and their failure to agree, for which reason no appraisalment was made. *Id.* .....321, 325
4. **Assignment of policy.**—As the mortgage clause of an insurance policy reserved no right of the mortgagee to approve assignments of the policy by the mortgagor, the want of such approval did not affect the validity of the policy in the hands of the assignee. *Funk v. Insurance Co.*.....525, 527
5. ——— Where the owner of property assigned to his vendee an insurance policy containing a mortgage clause the original premium was sufficient consideration to sustain the policy in the hands of the assignee. *Id.* .....525, 527
6. **Authority of agent.**—See Nos. 8, 9, 23.

## INSURANCE—CONTINUED:

7. **Fire.**—(See, also, Nos. 2, 4, 5, 13, 14, 20.) A parol contract to renew an existing contract of insurance is valid although no new policy is issued nor premium paid at the time of loss, providing a credit be given and payment of the premium is not a condition precedent. *Brown v. Insurance Co.*..... 442
8. ——— A stipulation to renew an insurance contract on the same conditions as the existing contract held to include the essentials of a contract of indemnity, and not to refer to the methods by which the original contract was made. *Id.*..... 442
9. ——— Because the original contract required approval by the principal on account of the agent's limited authority is no reason the renewal contract should be approved, the agent having been clothed with authority to make contracts. *Id.*..... 442
10. **Forfeiture.**—See Nos. 1, 18, 23, 24.
11. **Fraternal.**—See Nos. 1, 18, 19, 22-24.
12. **Guaranty fund.**—See No. 15.
13. **Mutual insurance—assessment on premium notes.**—The liability of a member of a mutual fire, lightning and tornado insurance company to pay assessments on his premium notes extends to these purposes only: (1) To maintain a reserve fund equal to ten per cent of such notes in force; (2) to pay losses and defray expenses. *Smith v. Insurance Co.*...697, 700
14. ——— An assessment not made for such purposes, but merely for purposes to be developed in the future, is illegal. *Id.*.....697, 700
15. ——— The statute authorizing certain mutual insurance companies to establish a guaranty fund does not permit the assessment of premium notes directly for such purposes. *Id.*.....697, 701
16. **Mutual insurance—contract—by-laws—signature.**—The assignee of a policyholder who signed an application agreeing to accept the policy subject to the by-laws, a copy of the application being attached to the policy, was bound thereby, although the copy of the by-laws attached to the policy was not signed, as the statute requires. *Id.*.....698, 708
17. **Notice of physical condition of delinquent.**—See No. 1.
18. **Payment of assessment diverted to another purpose.**—Where a lodge officer to whom insurance assessments are payable pays an assessment for a member, the officer's successor has no power to divert money paid by the member on a subsequent assessment to reimburse his predecessor. *Mosiman v. Benefit Association* .....670, 672
19. **Proof of death—seven years' unexplained absence.**—In an action by the beneficiary of a member of a fraternal insurance order who had disappeared and had not been heard from for more than seven years a judgment for the plaintiff was affirmed. *Farington v. Modern Woodmen*..... 841

## INSURANCE—CONTINUED:

20. **Provision against encumbrances—validity of lien.**  
—A provision in a fire-insurance policy against encumbering or mortgaging the property was not violated by the execution of a mortgage which was not a valid and subsisting lien upon the property. *Rowland v. Insurance Co.*..... 220
21. **Renewal contract.**—See Nos. 7-9.
22. **Representations by the applicant.**—A finding that the insured had not misrepresented his age in his application for membership in a fraternal insurance order held conclusive on review. *King v. Modern Woodmen* ..... 352
23. **Waiver of health certificate required before reinstatement.**—The act of a local officer in accepting past-due assessments without requiring a health certificate was adopted by the association when the general secretary received the money and, after the member's death, notified the beneficiary the payment was unavailing, giving no reason except the mistaken one that the amount was insufficient. *Mosiman v. Benefit Association* ..... 670, 673
24. — Where a health certificate was required before reinstatement of one whose insurance society membership had been forfeited by failure to pay assessments in time, acceptance of delinquent dues without exacting any showing as to his physical condition waived the requirement. *Id.*..... 670, 673

INTENTION—See CRIMINAL LAW.

INTEREST—See DAMAGES; TAXATION, 67.

## INTOXICATING LIQUORS:

1. **Assistant attorney-general—fee for prosecution.**  
In an action against a county by an assistant attorney-general to recover fees for prosecutions under the prohibitory law a motion to make a petition more definite was properly denied. *Mikesell v. Wilson County* ..... 502, 505
2. **Clubrooms—receiving or keeping liquor for use as a beverage.**—A statute prohibiting the maintenance of a clubroom where intoxicating liquors are received or kept for use as a beverage held to be within the title of an act relating to the "manufacture and sale" of such liquors, and to be valid. *The State v. Topeka Club* ..... 756
3. **Destruction of property.**—In an action against a city for injury to the person and property of a saloon keeper by a mob the conduct and reputation of the plaintiff may be shown in mitigation of damages to the property. *Stevens v. Anthony*..... 179

J.

**JOINDER—CAUSES OF ACTION**—See **ACTIONS AND REMEDIES**.

**JOINT CONSENT**—See **HOMESTEADS AND EXEMPTIONS**.

**JOINT DEFENDANTS**—See **EVIDENCE**, 33; **ACTIONS AND REMEDIES**, 11, 20, 21; **PLEADINGS**, 23.

**JOINT DEMURRER**—See **PLEADINGS**, 23.

**JOINT JUDGMENT**—See **PARTIES**, 6.

**JOINT OR SEPARATE CAUSES OF ACTION**—See **ACTIONS AND REMEDIES**.

**JUDGMENTS:**

See **CONTEMPT**; **COSTS**; **EXECUTIONS**; **INJUNCTION**; **QUIETING TITLE**, 7.

1. **Amount of award.**—(See, also, **DAMAGES**, 18-21.) Where the judgment was for more than the amount of an offer to confess judgment there was no reason for dividing the costs. *Matheney v. El Dorado*..... 725
2. **Collateral attack.**—(See, also, No. 14.) A judgment was not void because the affidavit for publication service was sworn to thirty-seven days before the order for such service was made. *Aherne v. Investment Co.* ..... 435
3. ——— The omission of a jurat from an affidavit made the basis of judicial action was a mere irregularity, and the proceeding was not subject to collateral attack. *James v. Logan*..... 285, 289
4. ——— A foreign decree in a divorce suit was not open to collateral attack on the ground of fraud in a suit for alimony in Kansas. *McCormick v. McCormick* ..... 32, 39
5. ——— A default judgment will not be held void on collateral attack even though the petition was demurrable. *Brumbaugh v. Wilson*..... 53, 57
6. ——— A judgment based on a willfully false affidavit for service by publication is not absolutely void. *Id.* ..... 57  
*Duphorne v. Moore*..... 159, 160
7. **Default.**—(See, also, Nos. 22, 24, 31.) A junior lienholder in default was entitled to have a judgment vacated because, after examining the pleadings and deciding his interests were not affected, the pleadings were amended in a material matter without his knowledge or consent. *Beekman v. Trower*..... 327
8. ——— A default judgment can not be vacated and the issues retried because the allegations in the plaintiff's petition, which constitute the merits of the case, are alleged by defendant to be untrue. *Garrett v. Minard* ..... 338, 339
9. ——— A default judgment based on actual notice to defendant is as conclusive against him upon every

## JUDGMENTS—CONTINUED:

- matter admitted by the default as if he had appeared and contested plaintiff's right of recovery. *Id.* ..... 338
10. ——— A default judgment will not be held void on collateral attack even though the petition was demurrable. *Brumbaugh v. Wilson*.....53, 57
11. Evidence against surety of receiver's default.—The finding and order of the court as to payment and distribution of the fund, made in the action in which a receiver was appointed, was evidence against a surety to show a breach of the conditions of the receiver's bond. *Bank v. Varner*.....692, 695
12. Findings included in general finding.—Under the testimony and the general finding it was assumed that the trial court held there was no failure of consideration for a sale with a warranty. *Colean v. Johnson*.. 657
13. Foreign.—(See, also, Nos. 4, 39.) The act of 1907 makes the enforcement of foreign divorce decrees based on publication service obligatory in this state and places such decrees on the same basis as judgments of the courts of this state. *McCormick v. McCormick* .....32, 43
14. Fraud.—A court had jurisdiction to hear a divorce suit even if the allegations of the petition were false, and to render a decree even if moved to do so by false testimony. *Id.*.....32, 36
15. ——— The record of a judgment annulling a grantor's title but voidable on the ground of fraud held to be notice to a purchaser from the time of the perpetration of the fraud. *Duphorne v. Moore*.....159, 161
16. ——— A default judgment can not be vacated and the issues retried because the allegations in the plaintiff's petition, which constitute the merits of the case, are alleged by defendant to be untrue. *Garrett v. Minard*.....338, 339
17. ——— The presumption that everyone knows the law does not extend so far as to make one guilty of fraud who asserts that to be the law which a court of last resort has declared to be otherwise. *Wagner v. Beadle* ..... 471
18. ——— A judgment based on a willfully false affidavit for service by publication is not absolutely void. *Brumbaugh v. Wilson*..... 57  
*Duphorne v. Moore*.....159, 160
19. ——— A foreign decree in a divorce suit was not open to collateral attack on the ground of fraud in a suit for alimony in Kansas. *McCormick v. McCormick* .....32, 39
20. ——— An action to set aside a judgment based on a willfully false affidavit for publication service must be brought in two years after actual or constructive notice of the fraud. *Duphorne v. Moore*.....159, 161

## JUDGMENTS—CONTINUED:

21. ——— The fraud for which a judgment may be set aside must be actual fraud, involving intentional wrong, as distinguished from legal or constructive fraud. *Wagner v. Beadle*..... 468
22. ——— One who had no actual notice of the pendency of the action does not establish ground for the vacation of the judgment by a showing that it was based upon a claim insufficient in law but admitting of assertion in good faith. *Id.*..... 468
23. ——— A judgment quieting title held not void, although based on a tax deed void on its face. *Smith v. Land Co.*..... 539
24. ——— A decree quieting title, rendered upon publication service and without actual notice, can not after three years be set aside as fraudulent merely by showing that plaintiff's title was based solely upon a defective tax deed. *Wagner v. Beadle*..... 469
25. ——— A junior lienholder in default was entitled to have a judgment vacated because, after examining the pleadings and deciding his interests were not affected, the pleadings were amended in a material matter without his knowledge or consent. *Beekman v. Trower* ..... 327
26. **Joint judgment.**—A motion to dismiss the appeal because the appellant did not make his codefendant a party was denied. *Marks v. Chumos*..... 563
27. **Mechanic's lien—personal judgment against landowner.**—The mechanic's lien statute does not authorize a personal judgment against a wife for the price of material furnished to her husband under a contract with him and used by him in improving her property. *Garrett v. Loftus*..... 556, 558
28. **Offer to confess.**—See No. 1.
29. **Parties entitled to complain.**—In an action to quiet title a defendant who put his title in issue and was defeated could not complain because judgment was given for plaintiff against another defendant whose title was valid. *Brice v. Sayler*..... 500
30. **Publication service.**—See, also, Nos. 2, 3, 13, 18, 20, 24, 48; PROCESS, 7, 12-14.) A judgment based upon publication service is void where the action is not commenced until after the person named as defendant is dead. *Harris v. Defenbaugh*..... 765, 768
31. ——— A default judgment quieting title, based upon service made by publishing a notice which states the defendant's name as Joseph Remer, is valid against Joseph Renner. *Puckett v. Hetzer*..... 726
32. ——— The failure to allege that service could not be had "with due diligence" was immaterial in an affidavit for publication service. *Smith v. Land Co.*.... 539
33. **Publication service—bona fide purchaser.**—A purchaser in reliance upon a judgment rendered upon



## JUDGMENTS—CONTINUED:

- publication service held to be a purchaser in good faith, although there was a quitclaim deed in his chain of title. *Id.*..... 539
34. — The rights of a purchaser whose vendor's title was quieted by a judgment rendered upon publication service discussed. *McNutt v. Nellans*..... 427
35. **Record lost or destroyed—secondary evidence—presumption.**—Where proceedings are attacked as void, and the record is shown to have been lost or destroyed, secondary evidence may be considered, and every reasonable presumption in support of the validity of the proceedings should be entertained. *Brumbaugh v. Wilson*..... 53, 57
36. **Replevin—alternative judgment for value of property.**—Where a plaintiff in replevin retained possession and prevailed in the action an alternative judgment for the value of the property in case a return could not be had was unnecessary. *Colean v. Johnson* ..... 656
37. **Res judicata.**—(See, also, Nos. 11, 22.) In determining whether a title is so doubtful that specific performance will not be decreed the court is not required to pass upon the validity of the title, as the judgment would not bind parties not before the court whose possible claims might affect the title. *McNutt v. Nellans* ..... 428
38. — A default judgment based on actual notice to defendant is as conclusive against him upon every matter admitted by the default as if he had appeared and contested plaintiff's right of recovery. *Garrett v. Minard* ..... 338
39. — A foreign divorce decree barred the recovery of alimony in this state, although alimony was not awarded nor specifically referred to in the decree. *McCormick v. McCormick*..... 32, 49
40. — In an action against a grantee's heirs to cancel a deed the extent of the adjudication as against a claim of an indebtedness discussed. *Cemetery Association v. Hanslip*..... 27
41. **Review of void judgment.**—A party is entitled to appeal from and obtain a reversal of a void judgment brought to the supreme court on a case-made. *Fleeman v. Railway Co.*..... 574
42. **Supersedeas.**—See BONDS.
43. **Time of rendition.**—It was error to render judgment in less than ten days after an answer was filed. *Beekman v. Trower*..... 327, 329
44. **Vacation—fraud.**—See Nos. 16, 21-25.
45. **Vacation—limitation of actions.**—See Nos. 20, 24.
46. **Vacation—mistake—issue presented by pleadings.**—The code provision that a judgment may be set aside at a subsequent term for "irregularity" in obtaining it authorizes a court to vacate a judgment

**JUDGMENTS—CONTINUED:**

- rendered on the pleadings because of a misapprehension as to what allegations they contained. *Cooper v. Rhea* ..... 109, 110
47. **Vacation—prerequisite.**—An objection to the opening of a judgment because plaintiff did not show that he had a valid cause of action not sustained. *Id.*.... 111
48. **Vacation—recovery of value of land sold to innocent purchaser.**—A defendant in a suit to quiet title who was served only by publication and who had the judgment vacated after the land had been sold to an innocent purchaser held entitled to a judgment against the plaintiff for its value. *Smith v. Land Co.*..... 539
49. **Vacation—waiver of jurisdiction.**—Where a judgment is rendered against parties over whom the court had no jurisdiction, and upon their request the judgment was reopened and the issues litigated, all questions of jurisdiction are thereby waived. *Aherne v. Investment Co.*..... 435, 439

**JUDICIAL SALES:**

- See LIMITATION OF ACTIONS, 15; MECHANIC'S LIEN; MORTGAGES, 15, 16.
1. **Equitable interest—purchaser of school land.**—A holder of a certificate to school land, having paid part of the purchase price, was the equitable owner of the land. *Robertson v. Howard*..... 588
2. ——— His equitable interest in such land was real estate, and as such was subject to sale on execution. *Id.* ..... 588
3. **Purchaser subrogated to rights of mortgagee.**—A purchaser in good faith at a void foreclosure was subrogated to the rights of the mortgagee and considered as a mortgagee in possession. *Capell v. Dill*, 652
4. **Redemption—foreclosure of purchase-money lien.**—The right of redemption from a sheriff's sale upon the foreclosure of a purchase-money lien limited to six months instead of eighteen, because one-third of the total price had not been paid. *Neef v. Harrell*.. 554
5. **Sale of land in this state by a foreign trustee in bankruptcy.**—A sale of a certificate of school land situated in this state by a foreign trustee in bankruptcy was made without jurisdiction, and conveyed no interest in the land to the purchaser. *Robertson v. Howard* ..... 588

**JURAT—See AFFIDAVITS.**

**JURISDICTION:**

- See ATTACHMENT; DIVORCE AND ALIMONY; PROCESS; QUO WARRANTO.
- Collateral attack.—See JUDGMENTS.
- Forfeiture proceedings.—See SCHOOLS AND SCHOOL LAND.
- Publication service.—See JUDGMENTS; PROCESS, 7, 12-14.
- Residence.—See ATTACHMENT, 4; DIVORCE AND ALIMONY, 2, 3.
- Sale of land in this state by a foreign trustee in bankruptcy.—See JUDICIAL SALES, 5.
- Venue.—See DIVORCE AND ALIMONY, 2, 3.
- Parties in default.—See JUDGMENTS.
- Reformation of tax deed.—See TAXATION, 42.

## JURISDICTION—CONTINUED:

1. **Action against deceased guardian's surety.**—A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly* ..... 1
2. **Action by beneficiary against trustee.**—Where the contract which created a trust compels a beneficiary to rely upon the trustee's personal liability, the beneficiary may maintain an action at law against the trustee or his administrator to recover a debt matured by the terms of the contract. *O'Neil v. Epting*, 245
3. **Amount in controversy.**—The term "city courts" in the statute limiting the jurisdiction of justices of the peace in counties where city courts are established does not include the county court of Douglas county. *McDougle v. Greenlees* ..... 440
4. **Appearance.**—See No. 15.
5. **Appellate—bond.**—An appeal bond signed only by the principal is not a nullity and may be amended by adding signatures of sureties after the statutory time for executing the bond has expired. *Elliott v. Bellevue* ..... 79
6. ——— Signers of an affidavit indorsed on an appeal bond who described themselves as sureties held to have executed the bond, although their signatures were not otherwise attached to it. *Id.* ..... 78
7. **Appellate—limitation of actions.**—Rulings upon a demurrer, made more than a year before the record was filed, not reviewed. *Newton v. Toews* ..... 18
8. **Appellate—record.**—Although a case-made was signed too late, it contained a transcript of the record and a motion to dismiss was denied. *Id.* ..... 17, 18
9. ——— A bill of exceptions was signed too late. *Id.*, 18
10. ——— A party is entitled to appeal from and obtain a reversal of a void judgment brought to the supreme court on a case-made. *Fleeman v. Railway Co.* ..... 574
11. **Contempt—accusation.**—Appellant could not object to the jurisdiction of the court in a contempt proceeding because no accusation had been filed, having filed an answer to the petition without objection. *Butler v. Butler* ..... 183
12. **Fictitious suit.**—Where an officer refuses to perform an act which he believes the statute requires, because of a doubt and because he wishes an early decision by a court, a proceeding by the state to compel such action is not fictitious. *The State v. Dolley* ..... 533, 537
13. **Fraud.**—See JUDGMENTS.
14. **Original—supreme court.**—A claim that the supreme court should not exercise original jurisdiction in a quo warranto proceeding involving the title to an office not sustained. *Fee v. Richardson* ..... 191

**JURISDICTION—CONTINUED:**

15. **Waiver.**—Where a judgment is rendered against parties over whom the court had no jurisdiction, and upon their request the judgment was reopened and the issues litigated, all questions of jurisdiction are thereby waived. *Aherne v. Investment Co.*.....435, 439

**JURY AND JURORS:**

See INSTRUCTIONS.

1. **Misconduct—consideration of matters not in evidence.**—Statements of facts within his personal knowledge by a juror, during the jury's deliberations, held not to be ground for a reversal. *Karner v. Railroad Company* ..... 843
2. **Right to jury trial.**—An action by a devisee of a valid will to cancel a deed the testator was fraudulently procured to execute when he was of unsound mind is equitable in character, and neither party is entitled to a jury trial. *Hospital Co. v. Philippi*..64, 68
3. ——— Where defendant demanded a jury trial it was said the case involved the examination of long accounts and was a proper one for reference. *Newton v. Toews*..... 18
4. ——— A tax-deed holder held not entitled to an injunction against defendants holding possession under the government title. *Baker v. Lane*.....715, 719
5. **Special findings.**—A party is entitled to have special findings of the ultimate facts of the case, but has no right to ask for mere evidentiary matters nor that the jury shall file a bill of particulars as to each fact. *Matheney v. El Dorado*.....720, 725
6. ——— Where in an equitable proceeding a jury is called to answer special questions, the court may adopt their findings or ignore them and make answers of its own, based upon an independent consideration of the testimony. *Hospital Co. v. Philippi* .....64, 68
7. ——— Where appellant requested more definite answers to certain questions it was proper for the court to inform the jury they could answer "Yes" or "No" to the questions. *Bank v. Hart*.....398, 401
8. ——— Plaintiff's opinion as to the speed of an automobile was improperly excluded; but the error was rendered immaterial by explicit findings that he failed to exercise due care and that defendant was not negligent. *Himmelwright v. Baker*..... 569
9. **Special findings and verdict.**—In a personal-injury action by an employee, contentions that certain findings were inconsistent, did not support the verdict, and were not sustained by the evidence, held untenable. *Bowers v. Railway Co.*.....95, 108
10. ——— Special findings examined and found not to be without support in the evidence nor contrary to the instructions of the court, and not inconsistent with the general verdict. *Walters v. Railway Co.*....739, 743

## JURY AND JURORS—CONTINUED:

11. — In a personal-injury action it was error to render judgment for defendant on the special findings. *Linker v. Railroad Co.*..... 580
12. **Special findings included in general verdict.**—In an action on a severable contract, abandoned because defendant refused to pay for work done, the general finding for plaintiff implied a finding that nonpayment was the cause of the abandonment, although there was a special finding that operations ceased partly because plaintiff had trouble with its drillers. *Bailey v. Gas Co.*..... 752
13. **Special questions.**—Certain special questions related to facts directly in issue and should have been submitted to the jury. *Watt v. Railway Co.*..... 464
14. — Where appellant requested more definite answers to certain questions it was proper for the court to inform the jury they could answer "Yes" or "No" to the questions. *Bank v. Hart*..... 398, 401
15. — An objection because the court, in submitting special questions, informed the jury that they were submitted by the appellant was without force. *Id.*..... 398, 401
16. — A claim of error in the refusal to submit certain special questions to the jury not sustained. *Manley v. Railway Co.*..... 211
17. **Verdict—admonition by the court urging agreement.**—An oral admonition, after the jury's deliberations had begun, relating to the burden of proof, held not to be reversible error. *Karner v. Railroad Company* ..... 842
18. — An admonition to the jury presenting to them in strong language their duty to agree if possible held not to constitute error. *Id.*..... 842
19. **Verdict—amount of award.**—See DAMAGES, 18-21; COSTS, 2.
20. **Verdict based on evidence contrary to physical facts.**—To justify an appellate court in setting aside a verdict supported by some evidence, on the ground that it is contrary to the undisputed physical facts, the inconsistency between the verdict and the facts must be conclusively demonstrated. *Sheppard v. Storage Co.* ..... 509
21. **Verdict contrary to the evidence.**—Where the sole question is whether plaintiff is entitled to recover on a contract, and there is no dispute concerning the amount, a verdict for half the amount claimed should not be received, and should be set aside as contrary to the evidence at the instance of either party. *Bressler v. McVey*..... 341
22. — Where there is no substantial evidence, direct or circumstantial, tending to prove a material fact, a finding that it exists can not be sustained. *Duncan v. Railway Co.*..... 230
23. **Verdict—instructed.**—See INSTRUCTIONS.

## JURY AND JURORS—CONTINUED:

24. **Weighing of testimony.**—See EVIDENCE; PRACTICE, SUPREME COURT, 7-13.

## JUSTICE OF THE PEACE—See PRACTICE, JUSTICE OF THE PEACE.

## L.

## LACHES—See ACTIONS AND REMEDIES.

## LANDLORD AND TENANT:

See MINES AND MINERALS.

1. **Acquisition of tax title by a tenant.**—Where the holder of a tax certificate acquired possession by lease and paid the contract rental he was not obligated to pay taxes nor estopped from acquiring a tax title. *Yurann v. Hamilton*.....528, 531
2. **Action by lessor—injury to growing crop—crop rent.**—A landlord who is to receive crop rent may maintain an action for injury to the growing crop without joining the tenant, but can only recover to the extent of his share. *Sayers v. Railway Co.*.....123, 124
3. **Lease signed by one partner only.**—A lease for more than one year, signed by one partner only, but made for the benefit of the firm, held also to obligate the partner who did not sign. *Marks v. Chumos*..... 562
4. **Notice to lessee—*lis pendens*.**—One who leased land from the party to whom it was awarded by the trial court was bound by the result of the appeal, although no supersedeas bond was given. *Kremer v. Schutz* .....175, 177
5. ——— Where land was awarded to a husband in a divorce suit, a lessee from the husband was bound to know that an appeal had been taken, and his leasehold was taken at the risk of a reversal of the judgment. *Id.*.....175, 176
6. **Oral assignment of lease.**—Where a written lease for more than one year was orally assigned by the lessee to a third party, who orally agreed with the lessor to comply with the terms of the contract, the lease was binding upon the assignee as if he had signed it. *Marks v. Chumos*..... 562
7. **Oral rental agreement.**—Where land was leased for crop rent, the tenant paying cash in advance for the landlord's share of the hay, the transaction was a lease and not within the statute of frauds. *Chase v. Barnes* ..... 30
8. **Rent accruing during pendency of action to cancel lease.**—A lessor held entitled to recover rent that accrued while an action by him to cancel the lease was pending. *Myers v. Shertzer*..... 275
9. **Sale of leased land — warranty — damages — lease ratified.**—Where after land was leased for crop rent and the tenant paid \$100 for the hay crop the landlord conveyed, warranting against encumbrances, the

## LANDLORD AND TENANT—CONTINUED:

grantee was entitled to recover but \$100 for breach of warranty, having ratified the lease by accepting the landlord's share of the other crop. *Chase v. Barnes* ..... 28

LEASES—See LANDLORD AND TENANT; MINES AND MINERALS.

LEVY—See TAXATION.

LICENSE AND LICENSEES—See PERSONAL INJURIES, 50, 52.

LIENS AND LIENHOLDERS—See ATTACHMENT; INSURANCE, 20; JUDICIAL SALES, 4; MECHANIC'S LIEN; MORTGAGES; TAXATION.

LIGHTNING INSURANCE—See INSURANCE, 13, 14.

## LIMITATION OF ACTIONS:

1. **Abandonment of severable contract—action for part performed.**—Where a party was entitled to abandon a severable contract and sue for the part performed the action was upon the contract, and the five-year statute of limitations applied. *Bailey v. Gas Co.* ..... 746, 751
2. **Accrual of action—amendment of petition.**—An amended pleading did not state a new cause of action, and the action was not barred. *Wilber v. Ronnau*... 171
3. **Accrual of action—fraud.**—The rule that the public records furnished constructive notice of fraud so as to set the statute of limitations in motion held not applicable to a vendor who innocently relied upon false representations made by the vendee respecting the state of the record. *Hutto v. Knowlton*..... 445
4. ——— An action to set aside a judgment based on a willfully false affidavit for publication service must be brought in two years after actual or constructive notice of the fraud. *Duphorne v. Moore*..... 159, 161
5. **Accrual of action—penalties for delay in furnishing cars.**—In an action to recover statutory penalties for failure to furnish freight cars demanded, the one-year statute of limitation applies. *Milling Co. v. Railway Co.* ..... 256, 260
6. ——— A penalty is incurred by a carrier for each day of neglect after the prescribed time for furnishing cars demanded, and each penalty is a distinct liability. *Id.* ..... 256, 261
7. ——— The subsequent furnishing of cars stops the accumulation of penalties, but does not suspend the statute as to penalties already incurred. *Id.*.... 256, 261
8. **Adverse possession.**—See ACTIONS AND REMEDIES, 26.
9. **Affirmative relief—debt barred by limitation.**—The fact that a mortgagee in possession could not enforce his mortgage because it was barred by limitation did not give the mortgagor the right to a judgment quieting title or for possession, the mortgage debt not having been satisfied. *Capell v. Dill*..... 652

**LIMITATION OF ACTIONS—CONTINUED:**

10. **Appeal and error.**—Rulings upon a demurrer, made more than a year before the record was filed, not reviewed. *Newton v. Toevs*..... 18
11. ——— A complaint of the allowance of an attorney's fee in an attachment proceeding not reviewable because not made within one year after the motion for a new trial was denied. *Dody v. Bank*..... 409
12. **Pleadings.**—Only explicit allegations showing the statute has run render a petition demurrable. *Brumbaugh v. Wilson*..... 57
13. **Purchaser of school land.**—The statute requiring the purchaser of school land to sue to enforce his rights within six months after the act took effect is not void on the ground that it fails to give a reasonable time within which to begin such action. *Davis v. Nation* ..... 410
14. **Quieting title.**—A suit to foreclose a mortgage against one not in privity with the mortgagor is analogous to a suit to quiet title, and the statute of limitations is not a defense. *Cooper v. Rhea*....109, 112
15. **Recovery of real property sold on execution.**—The limitation against actions for the recovery of real property sold on execution, brought by one claiming under the execution debtor, by title acquired after the judgment, applies to all sales, void and voidable alike. *James v. Logan* .....286, 290
16. **Redemption—foreclosure of purchase-money lien.**—The right of redemption from a sheriff's sale upon the foreclosure of a purchase-money lien limited to six months instead of eighteen, because one-third of the total price had not been paid. *Neef v. Harrell*.. 554
17. **Redemption from tax sale.**—The right of a landowner to redeem from a tax sale during his minority and one year thereafter is not hindered by the statute requiring suit to avoid a conveyance for taxes, except in certain cases, to be commenced within five years after the tax deed is recorded. *Hulsman v. Deal* ..... 518
18. **Suspension of the statute.**—See No. 7.
19. **Tax deed.**—See TAXATION.
20. **Vacation of a judgment.**—(See, also, No. 4.) A decree quieting title, rendered upon publication service and without actual notice, can not after three years be set aside as fraudulent merely by showing that plaintiff's title was based solely upon a defective tax deed. *Wagner v. Beadle* ..... 469
21. **Waiver.**—In an action for an accounting defendant by a stipulation waived the statute of limitations. *Newton v. Toevs*..... 20

**LIS PENDENS**—See ACTIONS AND REMEDIES.

**LIVE STOCK**—See TRESPASS AND TRESPASSERS; RAILROADS.

**LOST DOCUMENTS**—See HIGHWAYS, 7; JUDGMENTS, 35.



## M.

**MACHINERY**—See **PERSONAL INJURIES**, 20-31.

**MALICE**—See **DAMAGES**, 22.

**MANDAMUS:**

Issuance of railroad-aid bonds.—See **BONDS**.

Patent to school land.—See **SCHOOLS AND SCHOOL LAND**.

Tax levy—county high schools.—See **TAXATION**.

1. **Fictitious suit**.—Where an officer refuses to perform an act which he believes the statute requires, because of a doubt and because he wishes an early decision by a court, a proceeding by the state to compel such action is not fictitious. *The State v. Dolley*... 533, 537
2. **Parties**.—Where an individual to be benefited requests an officer to perform a statutory duty and is refused the state is a proper plaintiff in mandamus to compel its performance. *Id.*..... 533, 535
3. ——— In mandamus it is proper to make persons defendants from whom the performance of no duty is sought, but who might be affected by the judgment. *Id.*..... 533, 535
4. ——— The character of notice to be served upon such defendants is immaterial, so that they are informed of the pendency of the proceeding. *Id.*... 533, 535
5. **Performance of legal duty—discretion**.—Where a legal duty is cast upon a board of county commissioners that duty may be enforced by mandamus, and such duty can not be evaded upon the ground that the county officials have a discretion to act. *School District v. Wilson County*..... 806, 811
6. **Pleadings**.—In a mandamus proceeding against a public officer, if other defendants contend that on the face of the papers no peremptory writ should issue, their contention can be heard without their filing any pleading. *The State v. Dolley*..... 536
7. ——— If they claim that any allegation in the writ or answer is untrue, or that other facts material to the controversy exist, it is proper that they should file a written statement of such matters. *Id.*..... 536
8. ——— The name by which such statement is designated is immaterial. *Id.*..... 536
9. **State auditor—registration of bonds**.—The duty of the state auditor to register and certify municipal bonds in aid of railroads stated. *Railroad Co. v. Nation* ..... 345, 350
10. ——— A showing of expenditures equal to the face value of the bonds held not a prerequisite to the registration of such bonds. *Id.*..... 345, 350
11. **Title to office**.—A claim that quo warranto would not lie to determine the right to an office because plaintiff had an adequate remedy by mandamus or mandatory injunction not sustained. *Fee v. Richardson* ..... 191

**MANDATORY INJUNCTION**—See **INJUNCTION**.

**MANSLAUGHTER**—See **CRIMINAL LAW**, 11.

**MARKET VALUE**—See **DAMAGES**, 14, 15; **TAXATION**, 16;  
**SCHOOLS AND SCHOOL LAND**, 1.

**MARRIAGE**—See **HUSBAND AND WIFE**; **DIVORCE AND ALI-  
MONY**.

**MARSHALS OF CITY COURTS**—See **ELECTIONS**, 4.

**MASTER AND SERVANT**:

Assumption of risk.—See **PERSONAL INJURIES**.  
Common-law duty of master supplanted by statutory duty.—  
See **PERSONAL INJURIES**, 26-28.  
Contributory negligence.—See **PERSONAL INJURIES**.  
Duty of master to furnish safe appliances and conditions.—See  
**PERSONAL INJURIES**, 20-31, 37, 39, 41, 42, 44-46.  
Factory act—safeguarding machinery.—See **PERSONAL INJURIES**.  
Fellow servants.—See **PERSONAL INJURIES**.  
Injury to employee.—See **PERSONAL INJURIES**.  
Joint wrongdoers.—See **PERSONAL INJURIES**, 40.  
Rules and regulations.—See **PERSONAL INJURIES**, 25; **RAILROADS**,  
33, 34.  
Vice principal.—See **PERSONAL INJURIES**, 44.

**MAXIMUM RATES**—See **RAILROADS**, 37-46.

**MEASURE OF DAMAGES**—See **DAMAGES**.

**MECHANIC'S LIEN**:

1. **After-acquired property**.—A lien created on a wife's undivided interest in real estate by her husband does not extend to the shares of her cotenants, and after the lien has been perfected she may purchase and hold such shares unencumbered by the lien. *Garrett v. Loftus* ..... 556, 560
2. **Married woman's real estate—lien created by husband**.—(See, also, No. 1.) The statute allowing a lien on a married woman's real estate for material furnished her husband and used in improving it does not violate the constitutional provision respecting married women's rights to possess property apart from their husbands, nor conflict with the statutory provision that the separate estate of a married woman shall not be subject to the disposal of her husband or liable for his debts. *Id.* ..... 556
3. ——— The mechanic's lien statute does not authorize a personal judgment against a wife for the price of material furnished to her husband under a contract with him and used by him in improving her property. *Id.* ..... 556, 558

**MEMORANDUM**—See **CONTRACTS**, 26, 27.

**MEMORY OF A WITNESS**—See **EVIDENCE**.

**MERGER**—See **CONTRACTS**.

**MILEAGE**—See **FEES AND SALARIES**, 4.

**MINES AND MINERALS**:

1. **Action for royalties—security deposit sufficient to pay**.—Where a lessee deposits money as an advance payment of certain sums to become due under the lease from time to time, the lessor can not sue to re-  
60—82 KAN.

**MINES AND MINERALS—CONTINUED:**

- cover any such sums which have become due so long as the deposit in his hands is large enough to discharge his claim. *Patton v. Hamilton*..... 81
2. **Construction of lease.**—(See, also, Nos. 1, 9.) If a contract be fairly susceptible of two meanings, the general scope and purpose of the transaction and all the circumstances are to be considered in determining which meaning was intended. *Brick Co. v. Gas Co.* ..... 752, 754
3. **Forfeiture of lease.**—The burden was upon a lessor who sought to cancel a lease because of the lessee's failure to drill wells to show that damages was not an adequate remedy. *Howerton v. Gas Co.*..... 367
4. ——— Having failed to make such showing, a decree for cancellation not sustained. *Id.*..... 368
5. ——— If it be determined that such a rule of damages can not be applied, an alternative decree may be entered requiring defendant within a fixed time to drill sufficient wells or that the lease be canceled. *Id.* ..... 368, 370
6. **Injury to employee—pleadings.**—Allegations of negligence by which plaintiff claims to have been injured in a coal mine examined and found to be sufficiently definite. *Young v. Railway Co.*..... 332, 335
7. **Injury to employee—proximate cause—inspection.**—In a personal-injury action by an employee plaintiff must show that the injury occurred through the omission of some duty by the master, which was the proximate cause of the injury. *Pilgrim v. Verdigris*, 114
8. **Measure of damages for a breach of contract.**—The measure of damages for the failure of the holder of a mineral lease to drill wells upon the premises stated. *Howerton v. Gas Co.*..... 368, 369
9. **Rents and royalties.**—(See, also, No. 1.) A mineral lease construed to entitle the lessor to receive rent so long as the lease remained in force and the royalties did not equal the stipulated rental. *Myers v. Shertzer* ..... 275
10. ——— A lessor held entitled to recover rent that accrued while an action by him to cancel the lease was pending. *Id.*..... 275
11. **Taxation of mineral land—valuation.**—The officers are not required to value land containing salt deposits as if it were agricultural land, nor by the quantity of salt mined during the preceding year. *Salt Co. v. Ellsworth County*..... 206
12. ——— The commission may avail itself of any information it can obtain that will enable it to make a just estimate of the actual value. *Id.*..... 206
13. **Transportation of oil—maximum rates.**—See **RAILROADS.**

**MINORS**—See **GUARDIAN AND WARD; PARENT AND CHILD; TAXATION, 85.**

**MISREPRESENTATIONS**—See **FRAUD.**

**MISTAKE**—See **CONTRACTS**; **CORPORATIONS**, 2; **ELECTIONS**, 3; **JUDGMENTS**, 35, 46; **SCHOOLS AND SCHOOL LAND**, 14; **STATUTORY CONSTRUCTION**, 5; **TAXATION**, 14, 67.

**MOBS**—See **CITIES AND CITY OFFICERS**, 11.

**MONEY:**

Amount in controversy.—See **JURISDICTION**.  
 Amount of award.—See **DAMAGES**, 18-21.  
 Attachment.—See **ATTACHMENT**, 2, 3.  
 Deposited as security—action for royalties.—See **MINES AND MINERALS**, 1.  
 Loan to receiver—action by creditor to recover on bond.—See **BONDS**, 13.  
 Payment to agent.—See **AGENCY**, 5, 14.  
 Purchase-money lien.—See **JUDICIAL SALES**, 4.  
 Recovery.—See **MONEY PAID**.

**MONEY PAID:**

1. **Recovery—validity of contract**.—In an action to recover purchase money the defendant, who with his wife executed a deed and asked specific performance, was estopped to claim the contract was void because the land was a homestead and the wife did not join in the contract. *McNutt v. Nellans*.....424, 428

**MONOPOLY**—See **TRADE-MARKS**.

**MORTGAGES:**

See **INSURANCE**, 4, 5, 20.

1. **Assignment—erasure**.—The presumption that the holder of negotiable paper indorsed in blank is the owner was not destroyed by the erasure of a prior indorsement made by the payee. *King v. Bellamy*..... 301
2. **Chattel mortgages**.—(See, also, No. 14.) Where the maker of an unrecorded chattel mortgage was allowed to remain in possession and sell from the stock without accounting to the mortgagee the instrument was void. *Brooks v. Bank*..... 597
3. ——— A chattel mortgage on his stock by an insolvent merchant, executed less than four months prior to his bankruptcy, held to be a voidable preference under the national bankruptcy act. *Id.*..... 597
4. ——— Where a chattel mortgage allowed the mortgagor to keep the property at a certain place, he had no right to hold possession at another place without the knowledge or consent of the mortgagee. *Lemaster v. Fisher* ..... 280
5. ——— A provision in a chattel mortgage that if the "indebtedness shall be deemed insecure" the property might be taken from the mortgagor construed. *Id.* .....280, 282
6. ——— A petition in replevin by a chattel mortgagee stated a cause of action as against an objection to evidence. *Id.*..... 281
7. ——— A mortgagor of chattels may with the oral consent of the mortgagee make a valid sale of the property to a purchaser in good faith, notwithstanding the statute making it a misdemeanor to dispose of mortgaged chattels without the written consent of the mortgagee. *Reese v. Kapp*..... 304

**MORTGAGES—CONTINUED:**

8. — In an action to reform a chattel mortgage and enforce it by judgment against a third party for the proceeds of the sale of the property the mortgagors are proper defendants. *Stewart v. Falkenberg*...576, 579
9. — In an action to reform a chattel mortgage and enforce it there was no misjoinder of causes of action. *Id.* .....576, 579
10. — In an action to reform a chattel mortgage and recover the proceeds of the property from a third party the mortgagors, having filed a disclaimer, were not necessary parties to an appeal by the defendant. *Id.* .....576, 578
11. — Plaintiff was entitled to foreclose a chattel mortgage or waive the conversion and sue on the implied contract to pay the value of the property sold. *Id.* .....580
12. — In replevin by a mortgagee of chattels, where the defense was that plaintiff lacked capacity to sue and that the property was exempt, the burden of proof was upon the defendant. *Colean v. Johnson*..... 655
13. **Encumbrance on insured property—validity of lien.**—A provision in a fire-insurance policy against encumbering or mortgaging the property was not violated by the execution of a mortgage which was not a valid and subsisting lien upon the property. *Rowland v. Insurance Co.*..... 220
14. **Enforcement by a foreign corporation.**—A foreign corporation may maintain an action to enforce a mortgage on property in this state without being authorized to engage in business in the state. *Stewart v. Falkenberg*.....576, 579
15. **Foreclosure.**—(See, also, Nos. 11, 14, 18.) In order to foreclose a mortgage against a defendant who does not claim under the mortgagor the plaintiff must show that the mortgagor had title to the property, so that the mortgage created a lien. *Cooper v. Rhea*....109, 113
16. — A suit to foreclose a mortgage against one not in privity with the mortgagor is analogous to a suit to quiet title, and the statute of limitations is not a defense. *Id.*.....109, 112
17. **Limitation of actions.**—See Nos. 16, 19.
18. **Mortgagee in possession.**—A purchaser in good faith at a void foreclosure was subrogated to the rights of the mortgagee and considered as a mortgagee in possession. *Capell v. Dill*..... 652
19. — The fact that a mortgagee in possession could not enforce his mortgage because it was barred by limitation did not give the mortgagor the right to a judgment quieting title or for possession, the mortgage debt not having been satisfied. *Id.*..... 652
20. **Subrogation.**—See No. 18.

**MOTIVE**—See EVIDENCE, 77; CRIMINAL LAW, 11.

**MULTIPLICITY OF ACTIONS**—See ACTIONS AND REMEDIES.

**MUNICIPAL CORPORATIONS**—See **CITIES AND CITY OFFICERS**; **COUNTIES**; **SCHOOLS AND SCHOOL LAND**.

**MUTUAL INSURANCE**—See **INSURANCE**.

## N.

**NAMES**—See **TRADE-MARKS**; **PROCESS**, 11; **CRIMINAL LAW**, 9, 10.

## NEGLIGENCE:

Alighting from a moving train.—See **PERSONAL INJURIES**, 13.  
 Allegations and proof.—See **PLEADINGS**, 3, 24.  
 Allegations of negligence—definiteness.—See **PLEADINGS**, 14.  
 Assumption of risk.—See **PERSONAL INJURIES**.  
 Automobiles.—See **DAMAGES**, 22; **PERSONAL INJURIES**, 55.  
 Contributory.—See **PERSONAL INJURIES**.  
 Defective appliances or conditions.—See **PERSONAL INJURIES**, 2, 20-31, 37, 39, 41, 42, 44-46, 50.  
 Defective bridge.—See **HIGHWAYS**, 8-11.  
 Delivery of a telegram.—See **TELEGRAPH COMPANIES**.  
 Duty to look and listen.—See **PERSONAL INJURIES**, 15, 16, 47.  
 Exemplary damages.—See **DAMAGES**.  
 Factory act—guarding machinery.—See **PERSONAL INJURIES**.  
 Failure to stop train for passenger to alight.—See **PERSONAL INJURIES**, 61.  
 Fellow servants.—See **PERSONAL INJURIES**.  
 Injury by a mob.—See **CITIES AND CITY OFFICERS**.  
 Injury by fire.—See **RAILROADS**.  
 Injury by trespassing animals.—See **TRESPASS AND TRESPASSERS**.  
 Injury to goods.—See **RAILROADS**.  
 Injury to growing crops.—See **DAMAGES**, 14-16.  
 Injury to stock.—See **RAILROADS**.  
 Injury to the person.—See **PERSONAL INJURIES**.  
 Joint wrongdoers.—See **PERSONAL INJURIES**, 40.  
 Laches.—See **ACTIONS AND REMEDIES**.  
 "Last clear chance."—See **PERSONAL INJURIES**, 6.  
 Neglect or refusal to perform official duty.—See **OFFICE AND OFFICERS**.  
 Notice of injury and claim for damages.—See **PERSONAL INJURIES**; **RAILROADS**, 28.  
 Obstruction of a stream—injury to riparian owner.—See **WATERS AND WATERCOURSES**.  
 Permanency of injuries.—See **PERSONAL INJURIES**.  
 Proximate cause of injury.—See **PERSONAL INJURIES**.  
 Railway crossing.—See **PERSONAL INJURIES**, 18.  
 Special damages.—See **PLEADINGS**.  
 Special findings and verdict.—See **JURY AND JURORS**.  
 Vice principal.—See **PERSONAL INJURIES**, 44.  
 Violation of rules by trainmen.—See **RAILROADS**, 33, 34.  
 Wanton.—See **DAMAGES**, 20, 22.

## NEGOTIABLE INSTRUMENTS:

- Payment by a surety before maturity—contribution.—See **SURETYSHIP AND GUARANTY**, 5.  
 Payment—manner of payment by a surety—contribution.—See **SURETYSHIP AND GUARANTY**, 6.  
 Surrender of notes given for money obtained by fraudulent misrepresentations.—See **ACTIONS AND REMEDIES**, 7.
1. **Alteration of indorsements.**—The presumption that the holder of negotiable paper indorsed in blank is the owner was not destroyed by the erasure of a prior indorsement made by the payee. *King v. Belamy* ..... 301
  2. **Attachment—damages.**—The measure of damages for the wrongful attachment of money and notes by way of garnishment is interest on the money and notes during the time they were held and the necessary expenses incurred in regaining possession of the property. *Dody v. Bank*..... 406

## NEGOTIABLE INSTRUMENTS—CONTINUED:

3. **Bank check.**—See Nos. 5, 6; SURETYSHIP AND GUARANTY, 6; SPECIFIC PERFORMANCE, 12.
4. **Bona fide purchaser.**—The burden of proof rested upon an indorsee to establish his ownership of a note, but not to prove that he purchased in good faith and without notice of fraud. *Bank v. Abmeyer*.....283, 285
5. **Consideration.**—Mutual promises held a sufficient consideration for negotiable paper. *Hawkins v. Windhorst* ..... 522
6. ——— Where a purchaser of cattle gave a check as payment to the vendor, but afterward declined to receive the cattle, he could not, in an action by the payee on the check, defend on the ground that no cattle were received. *Id.*..... 522
7. **Fraud.**—(See, also, No. 4.) Where the maker of a note pleaded fraud in its inception the reply of an indorsee was defective as a denial, but as the case was tried as though the alleged fraud was in issue the maker could not on appeal insist that his averments of fraud were admitted. *Bank v. Abmeyer*... 283

## NEW TRIAL:

Excessive or inadequate award.—See DAMAGES.  
 "Fraud practiced by the successful party."—See JUDGMENTS.  
 Misconduct of jury.—See JURY AND JURORS.  
 Verdict contrary to evidence.—See JURY AND JURORS.

1. **Motion—review of ruling.**—A determination of a question of fact, upon conflicting affidavits, on the hearing of a motion for a new trial because of accident and surprise, held not reviewable. *Yurann v. Hamilton* ..... 528
2. **Waiver of erroneous denial—refusal of applicant to specify errors.**—Where the court requests an applicant for a new trial to point out specifically the errors complained of, and the applicant declines or neglects to do so, any error in denying the motion will be regarded as waived. *Riverside v. Bailey*..... 429

## NOMINAL CONSIDERATION—See DEEDS, 8.

## NOTICE:

Actual notice of pending action.—See JUDGMENTS, 9, 22, 24.  
 Assumption of risk.—See PERSONAL INJURIES.  
 Bona fide purchaser.—See SALES, 26-40.  
 Burden of proof.—See EVIDENCE.  
 Chattel mortgage.—See MORTGAGES.  
 Claim for damages.—See RAILROADS, 26-30.  
 Contributory negligence.—See PERSONAL INJURIES.  
 Creditors of a corporation—stock issued at a discount.—See CORPORATIONS, 11, 12.  
 Defect in rails and ties of a railway track.—See PERSONAL INJURIES, 39.  
 Defective appliances.—See PERSONAL INJURIES, 50.  
 Defective bridge.—See HIGHWAYS, 8-11.  
 Definiteness of pleadings.—See PLEADINGS.  
 Election.—See ELECTIONS, 3.  
 Forfeiture.—See SCHOOLS AND SCHOOL LAND.  
 Forgery.—See CRIMINAL LAW, 10.  
 Fraud.—See FRAUD.  
 Information or complaint.—See CRIMINAL LAW.  
 Injury to employee—claim for damages.—See PERSONAL INJURIES, 62-66.  
 Insanity of grantor.—See DEEDS, 8.

**NOTICE—CONTINUED:**

Judicial.—See EVIDENCE; PRACTICE, SUPREME COURT, 37, 38.  
 Knowledge of contents of a will.—See WILLS, 10.  
 Knowledge of the law—presumptions.—See FRAUD, 35.  
 Knowledge that signal to engineer has been seen and obeyed.—  
     See RAILROADS, 33, 34.  
*Lis pendens*.—See ACTIONS AND REMEDIES.  
 Parties in default.—See JUDGMENTS, 7-10.  
 Physical condition of delinquent—reinstatement.—See INSUR-  
     ANCE, 1.  
 Principal and agent.—See AGENCY, 15, 16.  
 Property owners—tax levy.—See TAXATION, 7.  
 Publication service.—See JUDGMENTS; PROCESS, 7, 12-14.  
 Purchaser.—See SALES.  
 Service of process.—See PROCESS.  
 Signals.—See PERSONAL INJURIES, 35, 36, 47.  
 Switching cars—licensee in a car on sidetrack.—See PERSONAL  
     INJURIES, 50.  
 Will.—See WILLS, 19, 20.

**NUISANCES**—See CITIES AND CITY OFFICERS, 14; WATERS  
 AND WATERCOURSES.

**O.**

**OATH**—See OFFICE AND OFFICERS, 3-5, 9.

**OFFICE AND OFFICERS:**

Board of equalization.—See TAXATION.  
 City.—See CITIES AND CITY OFFICERS.  
 County.—See COUNTIES; HIGHWAYS; TAXATION; SCHOOLS AND  
     SCHOOL LAND.  
 Marshals of city courts.—See ELECTIONS, 4.  
 Receivers.—See BONDS; FEES AND SALARIES.  
 Referee.—See PRACTICE, DISTRICT COURT, 9-14.  
 State.—See MANDAMUS; CRIMINAL LAW, 4; COSTS, 5.  
 Townships.—See HIGHWAYS, 11; TAXATION, 73.

1. **Accounting**.—See ACCOUNTS AND ACCOUNTING.
2. **Acknowledgment of writings**.—An abbreviated ac-  
 knowledgegment of the execution of a tax deed by the  
 county clerk held sufficient. *Less v. Yeats*.....105, 107
3. ——— The statutory certificate for the authentica-  
 tion of depositions can not be used on the ordinary  
 affidavit, and the code prescribes no form of jurat to  
 be appended to affidavits. *James v. Logan*.....285, 287
4. ——— A written declaration under oath is an affi-  
 davit although no jurat is attached. *Id*.....285, 287
5. ——— The jurat is evidence that an oath was ad-  
 ministered, and in the absence of a jurat the fact  
 may be proved by evidence *aliunde*. *Id*.....285, 288
6. **Action to try title**.—A claim that the supreme court  
 should not exercise original jurisdiction in a quo  
 warranto proceeding involving the title to an office  
 not sustained. *Fee v. Richardson*..... 191
7. ——— A claim that quo warranto would not lie to  
 determine the right to an office because plaintiff had  
 an adequate remedy by mandamus or mandatory in-  
 junction not sustained. *Id*..... 191
8. **Appointment—authority**.—In an action against a  
 county by an assistant attorney-general to recover  
 fees for prosecutions under the prohibitory law a  
 motion to make a petition more definite was prop-  
 erly denied. *Mikesell v. Wilson County*.....502, 505



## OFFICE AND OFFICERS—CONTINUED:

9. **Appointment—confirmation—oath—commission—authority.**—A marshal appointed, confirmed and sworn had authority to arrest on view, without a warrant, although no commission had been issued and he had not subscribed to the oath. *Morrison v. Pence* ..... 420, 422
10. **Appointment irregular—acts ratified.**—A city that appointed a superintendent to supervise the building of a bridge, having accepted the work done under his supervision, could not deny liability therefor because of irregularity in his appointment. *Matheney v. El Dorado* ..... 720, 724
11. **Corruption in office.**—See Nos. 15-20.
12. **Election—qualified voters.**—Marshals of city courts (Laws 1905, ch. 193) are not "city officers," and women are not "qualified voters" in the election of such marshals. *Fee v. Richardson*..... 190, 192
13. **Embezzlement by a state officer.**—In the statute forbidding the embezzling by an officer of the state of money "belonging to such estate," the word "estate" is manifestly intended for "state," and must be so construed. *The State v. Radford*..... 853
14. **Fees and salaries.**—See FEES AND SALARIES.
15. **Forfeiture.**—Corruption within the meaning of the statute authorizing the removal of a county commissioner from office defined. *The State v. Kennedy*, 373, 381
16. ——— In order that payment of excessive or illegal demands against a county may be corrupt the commissioner must have intended to violate his duty, misappropriate funds and secure to himself or another unlawful gain. *Id.*..... 373, 381
17. ——— The payment of unverified claims against a county, through inadvertence and without wrongful intent, did not constitute corruption. *Id.*..... 374, 382
18. ——— In an action to remove a commissioner from office the burden of showing corruption rests upon the state. The law presumes honesty and good faith until the contrary is made to appear. *Id.*..... 374, 382
19. ——— Record proof of the number of meetings a commissioner attended does not tend to prove that other services were not performed, or cast upon him the burden of justifying the receipt of more compensation than he was entitled to for attending board meetings. *Id.* ..... 374, 382
20. ——— Payment of claims not sufficiently itemized, through a misinterpretation of the statute and in reliance upon the advice of the county attorney, did not constitute corruption. *Id.*..... 374, 383
21. ——— It is not every omission within the strict letter of the law that will entail forfeiture of office for neglect of duty. *Id.*..... 374, 386
22. ——— The neglect must be one which endangers the public welfare, and must disclose either willfulness or indifference to duty so persistent that the safety of the public interests is threatened. *Id.*.. 374, 386

OFFICE AND OFFICERS—CONTINUED:

23. — Under the statute providing for the removal of a county officer who neglects or refuses to perform any act which it is his duty to perform, the duty must be personal and the act one which the officer has legal capacity and authority to perform. *Id.*, 374, 384
  24. — Irregularities in the publication of statements of sums of money allowed and in advertisements for bids for bridge repair work held not to be neglect of duty justifying the removal of a commissioner from office. *Id.*.....375, 386
  25. — Failure to publish estimates of expenditures upon which tax levies were made and failure to advertise for bids for the repair of a bridge held not neglect of duty warranting the removal of a commissioner from office. *Id.*.....375, 385
  26. — The court has discretion in quo warranto proceedings, and is not obliged to deprive an official of his office on account of irregularities, although not sanctioning his conduct. *Id.*..... 388
  27. **Mandamus.**—See MANDAMUS.
  28. **Misfeasances when acting in governmental capacity.**—A city is not liable in damages for misfeasances of its officers acting in a governmental capacity. *Edson v. Olathe*..... 4
  29. — The rule applied in an action against a city for the passage of an ordinance repealing a franchise ordinance. *Id.*..... 4
  30. **Mistake or omission of duty.**—Where proceedings are attacked as void, and the record is shown to have been lost or destroyed, secondary evidence may be considered, and every reasonable presumption in support of the validity of the proceedings should be entertained. *Brumbaugh v. Wilson*..... 53, 57
  31. **Neglect or refusal to perform official duty.**—See Nos. 21-25; MANDAMUS.
  32. **Public records.**—See EVIDENCE, 72.
  33. **Removal of shade trees growing in streets.**—An arbitrary decision by a city officer, not made in good faith, that shade trees growing in a street are a nuisance, when they are not and there is no necessity for cutting them down, is no protection to an officer who cuts them down when an action is brought against him by the abutting owner to recover for their loss. *Remington v. Walthall*..... 234
- OIL**—See MINES AND MINERALS; RAILROADS, 37-46.
- OPINION TESTIMONY**—See EVIDENCE.
- ORAL AGREEMENTS**—See FRAUD; SPECIFIC PERFORMANCE; INSURANCE, 7-9; MORTGAGES, 7.
- ORDINANCES**—See CITIES AND CITY OFFICERS, 1, 13.

## P.

PARDON—See CRIMINAL LAW.

## PARENT AND CHILD:

See WILLS, 9, 10.

1. **Emancipation.**—A finding that a minor had been emancipated by his parent and that he was a resident of this state was sustained by evidence. *Lewis v. Railway Co.*..... 351

PAROLE—See COSTS, 4-6.

PAROL OR EXTRINSIC EVIDENCE—See EVIDENCE.

## PARTIES:

See BONDS; CONTEMPT; COSTS; LIMITATION OF ACTIONS; QUIETING TITLE, 5.

Abstract of the record.—See PRACTICE, SUPREME COURT.

Action *ex contractu* or *ex delicto*.—See ACTIONS AND REMEDIES.

Actual notice of pending action.—See JUDGMENTS, 9, 22, 24.

Admissions.—See EVIDENCE; PLEADINGS.

Appearance.—See BONDS; JURISDICTION, 15.

Briefs.—See PRACTICE, SUPREME COURT, 2.

Collusive or fictitious proceeding.—See JURISDICTION, 12.

Consolidation of actions.—See PRACTICE, DISTRICT COURT.

Default.—See JUDGMENTS; PLEADINGS, 11.

Election of remedies.—See ACTIONS AND REMEDIES.

Intimidation.—See CONSTITUTIONAL LAW, 2.

Joinder of causes of action.—See ACTIONS AND REMEDIES.

Joint defendants.—See EVIDENCE, 33; ACTIONS AND REMEDIES, 20, 34; PLEADINGS, 23.

Joint demurrer.—See PLEADINGS, 23.

Joint or separate causes of action.—See ACTIONS AND REMEDIES.

Laches.—See ACTIONS AND REMEDIES.

Publication service.—See JUDGMENTS; PROCESS, 7, 12-14.

Residence.—See ATTACHMENT, 4; DIVORCE AND ALIMONY, 2, 3; PARENT AND CHILD, 1; CORPORATIONS, 6, 7, 18, 19.

*Res judicata*.—See JUDGMENTS.

Service of process.—See PROCESS.

Waiver of jurisdiction.—See JURISDICTION.

1. **Action by landlord—injury to growing crop.**—A landlord who is to receive crop rent may maintain an action for injury to the growing crop, without joining the tenant, but can only recover to the extent of his share. *Sayers v. Railway Co.*.....123, 124
2. **Action on receiver's bond.**—A receiver's bond running to parties named and "all persons interested" protected one who loaned money, upon the court's order, to care for the property in the receiver's custody. *Bank v. Varner*.....691, 694
3. **Action to cancel deed fraudulently procured from testator.**—A deed void because the grantee knew of the grantor's insanity and paid only a nominal consideration did not revoke a will previously made by the grantor, and a devisee under the will had sufficient interest to maintain an action to cancel the deed, although there had been no disaffirmance of the deed or tender of the consideration paid by the grantee. *Hospital Co. v. Philippi*.....64, 68
4. **Action to reform chattel mortgage and recover proceeds of sale.**—(See, also, No. 5.) In an action to reform a chattel mortgage and enforce it by judg-

**PARTIES—CONTINUED:**

- ment against a third party for the proceeds of the sale of the property the mortgagors are proper defendants. *Stewart v. Falkenberg*..... 576, 579
5. **Appeal and error.**—(See, also, No. 15.) In an action to reform a chattel mortgage and recover the proceeds of the property from a third party the mortgagors, having filed a disclaimer, were not necessary parties to an appeal by the defendant. *Id.* 576, 578
6. ——— A motion to dismiss the appeal because the appellant did not make his codefendant a party was denied. *Marks v. Chumos*..... 563
7. **Appeal bond.**—See BONDS.
8. **Appeal—parties entitled to complain.**—In an action to quiet title a defendant who put his title in issue and was defeated could not complain because judgment was given for plaintiff against another defendant whose title was valid. *Brice v. Saylor*..... 500
9. **Assignee—holder of legal title.**—The rule that the holder of the legal title to a note may sue upon it, although not its beneficial owner, is not peculiar to instruments of that character. *Bailey v. Gas Co.*.... 751
- 9a. ——— The presumption that the holder of negotiable paper indorsed in blank is the owner was not destroyed by the erasure of a prior indorsement made by the payee. *King v. Bellamy*..... 301
10. **Assignee of administrator—evidence.**—A witness is not incompetent to testify to transactions with persons since deceased where the adverse party is the assignee of the administrator of an estate. *Stewart v. Falkenberg* ..... 576, 579
11. **Burden of proving capacity to sue.**—In replevin by a mortgagee of chattels, where the defense was that plaintiff lacked capacity to sue and that the property was exempt, the burden of proof was upon the defendant. *Colean v. Johnson*..... 655
12. **Disclaimer.**—See No. 5.
13. **Foreign corporation.**—A foreign corporation may maintain an action to enforce a mortgage on property in this state without being authorized to engage in business in the state. *Stewart v. Falkenberg*.. 576, 579
14. ——— Under a general denial in a replevin action defendant may defeat a recovery by plaintiff by showing it is a foreign corporation and not entitled to maintain the action. *Colean v. Johnson*..... 656
15. **Guardian and ward.**—The fact that a minor became of age after judgment in an action brought by his guardian did not abate the appeal by the guardian. *Mitchell v. Kelly*.....1, 4
16. **Mandamus.**—Where an individual to be benefited requests an officer to perform a statutory duty and is refused the state is a proper plaintiff in mandamus to compel its performance. *The State v. Dolley*.. 533, 535
17. ——— In mandamus it is proper to make persons defendants from whom the performance of no duty is

## PARTIES—CONTINUED:

- sought, but who might be affected by the judgment.  
*Id.* ..... 533, 535
18. ——— The character of notice to be served upon such defendants is immaterial, so that they are informed of the pendency of the proceeding. *Id.*... 533, 535
19. Real party in interest.—See No. 9.
20. Right to claim statute was discriminatory.—A carrier was not a proper party to insist that an act discriminated in favor of one class of shippers as against other shippers. *Tucker v. Railway Co.*.... 225

## PARTITION FENCES—See FENCES.

## PARTNERSHIP:

1. Breach of contract.—Where full performance of a contract was prevented by the defendant an action for damages for the breach accrued immediately. *Gilbert v. Grubel*..... 476, 479
2. ——— Where plaintiff had substantially complied with an agreement by which he was to conduct a business until the profits aggregated a certain sum, when he was to be given half the business, in an action for a breach by the defendant a claim that the plaintiff was permitted to establish his case by secondary and incompetent evidence not sustained. *Id.* ..... 476, 480
3. Breach of contract—measure of damages.—The measure of damages stated for the breach of an agreement by which plaintiff was to conduct a business until the profits amounted to a certain sum when he was to be given a half interest in the business. *Id.*..... 476, 482
4. Contract signed by one partner only.—A lease for more than one year, signed by one partner only, but made for the benefit of the firm, held also to obligate the partner who did not sign. *Marks v. Chumos* ..... 562

## PART PERFORMANCE—See SPECIFIC PERFORMANCE, 10-13; FRAUD, 29, 30.

## PASSENGERS—See PERSONAL INJURIES, 51.

## PASSES FOR SHIPPERS—See RAILROADS, 10, 11.

## PATENT—See SCHOOLS AND SCHOOL LAND.

## PAYMENT:

- Advancement as security.—See MINES AND MINERALS, 1.
- Assessments.—See INSURANCE, 18, 24.
- Bank check.—See NEGOTIABLE INSTRUMENTS, 5, 6; SPECIFIC PERFORMANCE, 12; SURETYSHIP AND GUARANTY, 6.
- Credit.—See INSURANCE, 7.
- Failure to pay taxes.—See ACTIONS AND REMEDIES, 27.
- Manner of payment by a surety.—See SURETYSHIP AND GUARANTY, 6.
- Mistake.—See CORPORATIONS, 2.
- Part performance of oral contract.—See SPECIFIC PERFORMANCE, 12.
- Payment of illegal or excessive demands against a county.—See COUNTIES.
- Payment to agent.—See AGENCY, 5, 14.

**PAYMENT—CONTINUED:**

- Preference.—See **BANKRUPTCY**; **FREES AND SALARIES**, 7.  
 Recovery of money paid.—See **MONEY PAID**.  
 Time—debt of principal.—See **SURETYSHIP AND GUARANTY**, 5.  
 Time—part performance of severable contract.—See **CONTRACTS**, 1, 71.  
 Time—premium on policy.—See **INSURANCE**, 7.

**PENALTIES**—See **RAILROADS**, 13-16, 38, 41, 45.

**PENDENTE LITE**—See **ACTIONS AND REMEDIES**, 29, 30.

**PERJURY**—See **JUDGMENTS**, 14, 18.

**PERMANENT INJURIES**—See **PERSONAL INJURIES**, 60, 67, 68.

**PERSONAL INJURIES:**

1. **Allegations of negligence—definiteness.**—(See, also, Nos. 31, 43.) The denial of a motion to require a petition charging negligence to be made more definite and certain was not error. *McGee v. McAuliff*..... 210
2. ——— **Allegations of negligence resulting in injury to plaintiff were sufficient, in the absence of a motion to make definite, to include the use of a defective appliance, as well as the failure properly to use a good appliance.** *Linker v. Railroad Co.*..... 581
3. **Assumption of risk.**—(See, also, Nos. 11, 12, 18, 33.) An engineer who was injured by the derailment of his engine did not assume the risk as to the condition of the roadbed. *Smith v. Railway Co.*..... 136, 138
4. ——— **A claim that an employee assumed the risk was not sustained.** *Cloud v. Railway Co.*..... 851, 853
5. **Contributory negligence.**—(See, also, No. 70.) The term "contributory negligence" discussed. *Lewis v. Barton* ..... 166
6. **Contributory negligence—"last clear chance."**—An instruction relating to the doctrine of the "last clear chance" was sufficient, plaintiff having failed to request a proper instruction. *Himmelwright v. Baker* ..... 569, 571
7. **Contributory negligence of employee.**—(See, also, No. 47.) The contributory negligence of an injured employee is no defense to an action under the factory act. *Caspar v. Lewin*..... 605, 627
8. ——— **A finding upon conflicting testimony that an engineer injured by a derailment was not guilty of contributory negligence by exceeding the speed limit held conclusive on review.** *Smith v. Railway Co.*.... 138
9. ——— **An employee was not guilty of contributory negligence in not adopting a safer method of performing a task assigned to him.** *Fliege v. Railway Co.* ..... 147, 149
10. ——— **Whether it was practicable to safeguard machinery and whether an employee was guilty of contributory negligence were questions of fact, and their determination upon conflicting evidence was conclusive on review.** *Lewis v. Barton*..... 163

## PERSONAL INJURIES—CONTINUED:

11. ——— The "factory act" (Laws 1903, ch. 356) excludes the defense of assumed risk, but not of contributory negligence. (See *Caspar v. Lewin*, 605, 627.) *Id.* ..... 163
12. ——— Whether an employee injured by an explosion in a mine assumed the risk and was guilty of contributory negligence were questions for the jury. *Young v. Railway Co.* ..... 332, 336
13. **Contributory negligence of passenger.**—Whether a passenger who, under the conductor's direction, alighted from a moving train (which did not stop at his destination) was guilty of contributory negligence was a question for the jury. *Walters v. Railway Co.* ..... 739, 741
14. ——— Whether a passenger who was struck by a crane while boarding a moving train was guilty of contributory negligence was a question for the jury. *Leslie v. Railway Co.* ..... 153, 158
15. ——— The duty of a shipper accompanying stock to look and listen before crossing tracks between the station and his train stated. *Coon v. Railway Co.* ... 311
16. ——— Whether a passenger on a freight train, who was injured while crossing tracks at a station, was guilty of contributory negligence was a question of fact. *Id.* ..... 311
17. **Contributory negligence of pedestrian.**—See No. 55.
18. **Contributory negligence of traveler at a crossing.**—One who, with knowledge of its condition, drove over a railway crossing while it was being repaired could not recover from the company for resulting injuries. *McClelland v. Railway Co.* ..... 167
19. **Exemplary damages.**—Statements by an automobile driver made after an accident, showing a disregard of plaintiff's rights, tended to show malice and warranted a recovery of punitive damages. *Martin v. Garlock* ..... 266, 268
20. **Factory act—safeguarding machinery.**—(See, also, Nos. 5, 10, 11.) In an action under the factory act what proof is necessary to establish liability in the first instance stated. *Caspar v. Lewin* ..... 605, 635
21. ——— Plaintiff need not prove the practicability of providing safeguards to the machinery. *Id.* ... 605, 635
22. ——— The factory act falls within the legitimate scope of the police power of the state, and the remedy prescribed for its enforcement is not obnoxious to either the state or the federal constitution. *Id.* ... 605, 629
23. ——— The word "any," as used in the factory act, defined. *Id.* ..... 628
24. ——— The contributory negligence of an injured employee is no defense to an action under the factory act. *Id.* ..... 605, 627
25. ——— The protection of the factory act extends only to persons acting within the scope of some em-

PERSONAL INJURIES—CONTINUED:

- ployment or labor, but the factory owner can not evade the statute by rules relating to the use of machinery. *Id.*.....605, 626
26. ——— The duty to safeguard machinery, imposed by the factory act, is not limited to workmen engaged in ordinary duties only. *Id.*.....604, 628
27. ——— The act was designed to protect persons employed or laboring in manufacturing establishments while in the performance of any duty. *Id.*.....604, 624
28. ——— The duties imposed by the factory act supplant the common-law duty of a master to exercise reasonable care to prevent foreseeable injuries. *Id.* .....604, 624
29. ——— None of the sections of the factory act is a transcript from the law of any other state and consequently had not been given a settled and definite meaning by the highest court of any other state when the statute was enacted. *Id.*.....604, 612
30. ——— A "manufacturing establishment," within the meaning of the statute requiring manufacturers to safeguard machinery when practicable, defined. *Id.* .....604, 607
31. ——— In an action under the factory act an allegation that it was defendant's duty to guard the cog-wheels by which plaintiff was injured held to imply that such guarding was practicable, in the absence of a motion to make more definite. *Gambill v. Bowen*.. 840
32. **Fellow servants.**—(See, also, Nos. 44, 66.) The constitutionality of the fellow-servant act discussed. *Smith v. Railway Co.*..... 254
33. ——— A section man injured by a fellow laborer while repairing track held within the protection of the fellow-servant act. *Id.*..... 248
34. **Injury to employee.**—(See, also, Nos. 3, 4, 8-11, 20-30, 33, 62-66, 74.) In a personal-injury action by an employee, contentions that certain findings were inconsistent, did not support the verdict, and were not sustained by the evidence, held untenable. *Bowers v. Railway Co.*.....95, 103
35. ——— A rule requiring a brakeman to know that a signal to an engineer has been seen, understood and obeyed before placing himself in a dangerous position held to be reasonable. *Id.*.....95, 102
36. ——— The word "know," as used in this rule, defined. It does not necessarily import absolute knowledge. *Id.* .....95, 103
37. ——— In a personal-injury action by an employee plaintiff must show that the injury occurred through the omission of some duty by the master, which was the proximate cause of the injury. *Pilgrim v. Verdigris* ..... 114
38. ——— Testimony that after an accident defendant's foreman said it was his fault and he had neglected his duty was hearsay. *Id.*.....114, 117



## PERSONAL INJURIES—CONTINUED: .

39. ——— An engineer is not bound to know every defect in the track, and if the ties and rails are in place he can assume the company has discharged its obligation to keep them in reasonably safe repair. *Smith v. Railway Co.*.....136, 138
40. ——— A purchaser and seller of machinery were engaged in a joint undertaking in installing it, and were jointly and severally liable to an employee negligently injured. *Fliege v. Railway Co.*.....147, 149
41. ——— While it was presumed that an employee was properly performing his duty when injured, the same presumption applied to the employer in respect to furnishing safe appliances. *Duncan v. Railway Co.* .....230, 234
42. ——— An instruction defining the duty of a master to furnish a safe place to work held not materially erroneous because the qualifying words "exercise ordinary care" were omitted. *Kamera v. Boiler Works* ..... 432
43. ——— Allegations of negligence by which plaintiff claims to have been injured in a coal mine examined and found to be sufficiently definite. *Young v. Railway Co.* .....332, 335
44. ——— A master's liability to an injured employee did not depend upon the superior rank of one of its employees, but whether there was a breach of some nonassignable duty by the master. *Maib v. Mill Co.* .....660, 663
45. ——— Where a mill employee was injured while helping to move an iron safe over a defective wooden trestle constructed by the employees for the purpose, a jury might reasonably infer from the facts that the master built the trestle and supplied it to the workmen for use as a completed structure. *Id.*, 660, 666
46. ——— If the master reserved to itself the erection of the trestle, instead of ordering the removal of the engine and leaving the employees free to exercise their own judgment in producing the ultimate result, the master's duty was not fully performed by furnishing sound material for the trestle and competent servants; and which of the two courses indicated was adopted was a question of fact. *Id.*.....660, 663
47. ——— An employee of an electric railway, after the replacing of a derailed car, was not under an absolute duty to keep a lookout while picking up tools, and the motorman of another car, which struck plaintiff, could have anticipated, in view of what he saw, that some one might be in a place of danger and ought to have stopped or sounded a warning. *Ray v. Railway Co.*..... 704
48. ——— In an action for the death of an engineer, killed by being struck by the girder of a bridge while leaning out of the cab window and looking for a signal from the conductor of the train, judgment for the plaintiff affirmed. *Cloud v. Railway Co.*..... 851

## PERSONAL INJURIES—CONTINUED:

49. ——— The testimony justified the inference that an engineer was killed by being struck by the girder of a bridge while leaning out of the cab window taking a signal in the line of duty, although no one saw the girder of the bridge strike his head. *Id.*..... 851, 852
50. Injury to licensee.—(See, also, No. 52.) While an employee of an elevator company, rightfully in a car on defendant's sidetrack, was injured by a collision with another car which defendant was switching, defendant was *prima facie* negligent; and it did not establish a complete defense by showing it was unable to stop the moving car because of a defective brake, without further explanation. *Linker v. Railroad Co.* ..... 580
51. Injury to passenger.—(See, also, Nos. 13-16, 73.) Failure to stop a train at the destination of a passenger and afford him an opportunity to alight with safety is culpable negligence. *Walters v. Railway Co.* ..... 739, 741
52. ——— Conditions of a contract forbidding a shipper of stock to board a moving train were waived by defendant's conductor; the shipper was not a mere licensee, and the carrier was liable for damages sustained by him. *Leslie v. Railway Co.*..... 152, 157
53. ——— Regulations imposed upon a shipper accompanying stock to whom free transportation was given held reasonable. *Id.*..... 152, 156
54. ——— A shipper of stock to whom free transportation is given must comply with the conditions of the contract, and is obliged to know whether he has time to examine his stock at stopping places and return to his place before the train proceeds. *Id.*..... 152, 156
55. Injury to pedestrian.—(See, also, No. 6.) Plaintiff's opinion as to the speed of an automobile was improperly excluded; but the error was rendered immaterial by explicit findings that he failed to exercise due care and that defendant was not negligent. *Himmelwright v. Baker.*..... 569
56. Injury to traveler on a highway.—(See, also, Nos. 18, 69, 70.) Evidence showing knowledge by the chairman of the county board of the defective condition of the bridge where plaintiff was injured held sufficient as against a demurrer. *Mosier v. Butler County* ..... 708
57. ——— Knowledge of the defective condition of the bridge at the exact spot where it gave way is not required. *Id.*..... 710
58. ——— Actual knowledge of the defect is the same as actual notice. *Id.*..... 710
59. Joint wrongdoers.—See No. 40.
60. Measure of damages—future disability.—The allegations of the petition in an action for personal injuries were sufficient to present to the jury the question of future disability. *Fuqua v. Railroad Co.*..... 315

## PERSONAL INJURIES—CONTINUED:

61. ——— The evidence held sufficient to sustain the verdict in an action for personal injuries. *Id.*..... 316
62. Notice of injury and claim for damages.—A railway company had sufficient notice of an injury to an employee and his claim for damages. *Smith v. Railway Co.* .....248, 255
63. ——— Whether a provision requiring notice of any claim for a personal injury was waived was a question of law. *Id.*..... 141
64. ——— An agreement to give notice of a claim for personal injuries is in the nature of a forfeiture and will be strictly construed. *Id.*..... 140
65. ——— A provision that an employee would give thirty days' notice of any claim for a personal injury sustained while in defendant's employ held to have been waived. *Id.*.....136, 139
66. ——— An allegation that notice of an injury had been given as required by the fellow-servant act treated as surplusage, the negligence claimed being the failure of the master to perform a nondelegable duty. *Young v. Railway Co.*.....332, 334
67. Permanency of injuries.—(See, also, No. 60.) Where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries. *Barbour v. Rosedale* ..... 213
68. ——— An allegation that plaintiff did not believe she would ever recover from her injuries held equivalent to saying that the injuries were permanent. *Id.*..... 213
69. Proximate cause of injury.—(See, also, Nos. 37, 50.) Notwithstanding the frightening of his horses plaintiff's injury would not have resulted if the guard rail of a bridge had not been defective. *Mosier v. Butler County* ..... 709
70. ——— An instruction authorizing a recovery if plaintiff's injury was caused by defendant's negligence, without contributory negligence by plaintiff, was not materially erroneous for omitting to state that defendant's negligence must have been the proximate cause of an injury that ought to have been foreseen. *Martin v. Garlock.*..... 266
71. ——— In an action for negligence the refusal to give a requested instruction was not error, in view of the instructions given. *McGee v. McAuliff.*..... 210
72. Special findings and verdict.—In a personal-injury action it was error to render judgment for defendant on the special findings. *Linker v. Railroad Co.*..... 580
73. Special findings and verdict—amount of award.—Special findings examined and found not to be without support in the evidence nor contrary to the instructions of the court, and not inconsistent with the general verdict. *Walters v. Railway Co.*.....739, 743
74. Verdict and evidence.—Evidence examined, and the physical facts held not shown to be such as to au-

**PERSONAL INJURIES—CONTINUED:**

thorize a reviewing court to say that the story told by plaintiff's witnesses was false. *Sheppard v. Storage Co.* ..... 509

**PETITION:**

Amendment.—See PLEADINGS.  
 Definiteness.—See PLEADINGS.  
 Demurrer.—See PLEADINGS.  
 Duplicity.—See PLEADINGS, 26.  
 False allegations.—See JUDGMENTS, 14, 23, 24.  
 Highway.—See HIGHWAYS, 5, 13-15.  
 Joinder of causes of action.—See ACTIONS AND REMEDIES.  
 Objection to evidence.—See PLEADINGS.  
 Supplemental.—See PLEADINGS, 7.

**PHYSICIANS—See EVIDENCE, 59.**

**PLEADINGS:**

See QUIETING TITLE, 6, 7.  
 Accusation.—See CONTEMPT.  
 Information or complaint.—See CRIMINAL LAW.  
 Joinder of causes of action.—See ACTIONS AND REMEDIES.

1. **Abandoned pleading.**—An abandoned pleading has some evidentiary force in the nature of an admission, and should be received in evidence for what it is worth. *Watt v. Railway Co.*.....459, 461
2. **Admissions.**—(See, also, No. 1.) Where the maker of a note pleaded fraud in its inception the reply of an indorsee was defective as a denial, but as the case was tried as though the alleged fraud was in issue the maker could not on appeal insist that his averments of fraud were admitted. *Bank v. Abmeyer*..... 283
3. **Allegations and proof.**—Allegations of negligence resulting in injury to plaintiff were sufficient, in the absence of a motion to make definite, to include the use of a defective appliance, as well as the failure properly to use a good appliance. *Linker v. Railroad Co.* ..... 581
4. ——— Where a memorandum described land as in a certain county and of a certain quantity, the description did not satisfy the statute of frauds, and a petition asking performance of the contract was demurrable, although it stated that defendant recently showed plaintiff a tract of the size mentioned, in the county referred to. *Hampe v. Sage*.....728, 730
5. ——— If the memorandum had stated that the land described was the tract recently shown to plaintiff by defendant proof that a particular tract had been so shown might have been permissible. *Id.*..... 731
6. ——— Where an insurance policy required appraisalment as a prerequisite to action on the policy it was proper, under the pleadings, for plaintiff to show the appointment of appraisers and their failure to agree, for which reason no appraisalment was made. *Jerrills v. Insurance Co.*.....321, 325
7. **Amendment.**— (See, also, CRIMINAL LAW, 14.) Where, before a will was probated, a devisee sued to cancel a deed executed by the testator, but after probate filed an amended and supplemental petition, on which the cause was tried, an objection that the ac-

## PLEADINGS—CONTINUED:

- tion was prematurely brought became immaterial. *Hospital Co. v. Philippi*..... 64, 68
8. ——— An amended pleading did not state a new cause of action, and the action was not barred. *Wilber v. Ronnau*..... 171
9. ——— A junior lienholder in default was entitled to have a judgment vacated because, after examining the pleadings and deciding his interests were not affected, the pleadings were amended in a material matter without his knowledge or consent. *Beekman v. Trower*..... 327
10. ——— Refusal to allow an answer to be amended was not an abuse of discretion. *McCullough v. Hayde* ..... 734
11. ——— Where an answer was unsigned, but the attention of the court was not called to the omission until after judgment, it was proper to permit the answer to be amended by signing it. *Yurann v. Hamilton* ..... 528
12. **Construction.**—(See, also, No. 30.) An allegation that plaintiff did not believe she would ever recover from her injuries held equivalent to saying that the injuries were permanent. *Barbour v. Rosedale*..... 213
13. **Definiteness.**—(See, also, Nos. 3, 12, 24, 30.) Where a contract stipulated that a vendor might repurchase at an appraised value, a petition sufficiently alleged performance of the conditions respecting appraisement, in the absence of a motion to make more definite. *Wilber v. Ronnau*.....171, 174
14. ——— The denial of a motion to require a petition charging negligence to be made more definite and certain was not error. *McGee v. McAuliff*..... 210
15. ——— Allegations of negligence by which plaintiff claims to have been injured in a coal mine examined and found to be sufficiently definite. *Young v. Railway Co.*..... 332, 335
16. ——— In an action for false imprisonment the failure of the officer's answer justifying the arrest to state the offense and the grounds for the arrest was not material, plaintiff being fully informed as to the nature of the charge and the cause of his arrest. *Morrison v. Pence*.....420, 422
17. ——— In an action against a county by an assistant attorney-general to recover fees for prosecutions under the prohibitory law a motion to make a petition more definite was properly denied. *Mikesell v. Wilson County* ..... 502, 505
18. **Demurrer.**—(See, also, Nos. 4, 5.) A default judgment will not be held void on collateral attack even though the petition was demurrable. *Brumbaugh v. Wilson* ..... 53, 57
19. ——— Only explicit allegations showing the statute has run render a petition demurrable. *Id.*..... 57

PLEADINGS—CONTINUED:

20. ——— A petition to enjoin the collection of a tax which charged that the commission knowingly fixed an exorbitant and grossly excessive valuation on plaintiff's property was not demurrable. *Salt Co. v. Ellsworth County* ..... 203, 205
21. ——— On a demurrer to a petition containing several counts each count must be considered as if constituting the entire pleading. *Riverside v. Bailey* ... 429
22. ——— Neither the facts involved nor the averments of another count, unless incorporated by reference, can properly be considered upon such a hearing. *Id.*... 429
23. ——— While a court may in its discretion sustain a demurrer as to one defendant and overrule it as to the other, the court should overrule or sustain a joint demurrer according as the petition does or does not state a cause of action against either defendant. *School District v. Wilson County*..... 810
24. ——— In an action under the factory act an allegation that it was defendant's duty to guard the cogwheels by which plaintiff was injured held to imply that such guarding was practicable, in the absence of a motion to make more definite. *Gambill v. Bowen*... 840
25. **Departure.**—See No. 8.
26. **Duplicity.**—In an action for defendant's failure to account and pay over to his successor the money in his hands as treasurer, the petition stated a single cause of action. *Newton v. Toews*..... 18
27. **False allegations.**—(See, also, Nos. 9, 43.) The presumption that everyone knows the law does not extend so far as to make one guilty of fraud who asserts that to be the law which a court of last resort has declared to be otherwise. *Wagner v. Beadle*.... 471
28. ——— A court had jurisdiction to hear a divorce suit even if the allegations of the petition were false, and to render a decree even if moved to do so by false testimony. *McCormick v. McCormick*.....32, 86
29. ——— A default judgment can not be vacated and the issues retried because the allegations in the plaintiff's petition, which constitute the merits of the case, are alleged by defendant to be untrue. *Garratt v. Minard*.....338, 339
30. **General denial.**—(See, also, No. 2.) A denial of every allegation in the petition "prejudicial" or "adverse" to the defendant held not so defective as to present no issue. *Prunty v. Light Co.*..... 541
31. ——— Under a general denial in a replevin action defendant may defeat a recovery by plaintiff by showing it is a foreign corporation and not entitled to maintain the action. *Colean v. Johnson*..... 656
32. ——— It is the Kansas rule and practice that in replevin cases every defense, general or special, meritorious or technical, may be made under a general denial. *Id.*..... 658
33. **Immaterial error.**—See No. 16.

## PLEADINGS—CONTINUED:

34. **Judgment—mistake as to issues presented.**—The code provision that a judgment may be set aside at a subsequent term for "irregularity" in obtaining it authorizes a court to vacate a judgment rendered on the pleadings because of a misapprehension as to what allegations they contained. *Cooper v. Rhea*..... 109, 110
35. **Mandamus.**—In a mandamus proceeding against a public officer, if other defendants contend that on the face of the papers no peremptory writ should issue their contention can be heard without their filing any pleading. *The State v. Dolley*..... 536
36. ——— If they claim that any allegation in the writ or answer is untrue, or that other facts material to the controversy exist, it is proper that they should file a written statement of such matters. *Id.*..... 536
37. ——— The name by which such statement is designated is immaterial. *Id.*..... 536
38. **Objection to evidence.**—A petition in replevin by a chattel mortgagee stated a cause of action as against an objection to evidence. *Lemaster v. Fisher*..... 281
39. **Prayer for affirmative relief by defendant—quieting title.**—Where defendant in an action to quiet title claims title and asks affirmative relief the rule that plaintiff must succeed on the strength of his own title does not apply. *Brice v. Saylor*..... 500
40. **Signature.**—See No. 11.
41. **Special damages.**—The allegations of the petition in an action for personal injuries were sufficient to present to the jury the question of future disability. *Fugua v. Railroad Co.*..... 315
42. **Supplemental petition.**—See No. 7.
43. **Surplusage.**—In an action to rescind a contract for failure to make title as provided in the contract allegations that the vendor had made false representations concerning the title treated as surplusage. *Read v. Loftus* ..... 494
44. ——— An allegation that notice of an injury had been given as required by the fellow-servant act treated as surplusage, the negligence claimed being the failure of the master to perform a nondelegable duty. *Young v. Railway Co.*..... 332, 334
45. **Time.**—It was error to render judgment in less than ten days after an answer was filed. *Beekman v. Trower* ..... 327, 329
46. **Waiver.**—(See, also, Nos. 2, 11, 30.) Appellant could not object to the jurisdiction of the court in a contempt proceeding because no accusation had been filed, having filed an answer to the petition without objection. *Butler v. Butler*..... 133

## POSSESSION:

- See EJECTMENT; LANDLORD AND TENANT, 2; QUIETING TITLE; REPLEVIN.  
 Adverse.—See ACTIONS AND REMEDIES, 26.  
 Change of possession.—See INSURANCE, 5.  
 Custodian.—See REPLEVIN, 4, 7.

**POSSESSION—CONTINUED:**

Garnishment.—See ATTACHMENT, 2, 3.  
 Injunction against defendants in possession.—See INJUNCTION, 1.  
 Laches.—See ACTIONS AND REMEDIES, 22, 27.  
 Lien for taxes.—See TAXATION, 31.  
 Mortgaged personal property.—See MORTGAGES, 2, 4, 5.  
 Mortgagee in possession.—See MORTGAGES.  
 Part performance of oral contract.—See SPECIFIC PERFORMANCE, 11, 12.  
 Presumption of ownership.—See NEGOTIABLE INSTRUMENTS, 1.  
 Surrender of notes given for money obtained by fraudulent representations.—See ACTIONS AND REMEDIES, 7.  
 Trespasser.—See TRESPASS AND TRESPASSERS, 6.  
 Waiver of abstract of title.—See SALES, 8, 9.  
 Waiver of right to rescind.—See CONTRACTS, 70.  
 Writings—alteration.—See WILLS, 22, 23.

**PRACTICE, DISTRICT COURT:**

See CONTEMPT; COSTS; DISBARMENT PROCEEDINGS; DIVORCE AND ALIMONY; EVIDENCE; INJUNCTION; INSTRUCTIONS; JUDGMENTS; JURISDICTION; JURY AND JURORS; NEW TRIAL; PARTIES; PLEADINGS; QUO WARRANTO.  
 Amendment of pleadings.—See PLEADINGS; CRIMINAL LAW, 14.  
 Joinder of causes of action.—See ACTIONS AND REMEDIES.  
 Special findings.—See JURY AND JURORS.  
 Vacation of a judgment.—See JUDGMENTS.

1. Action against deceased guardian's surety.—A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly*, 1
2. Admonition to jury—duty to agree.—An oral admonition, after the jury's deliberations had begun, relating to the burden of proof, held not to be reversible error. *Karner v. Railroad Company*..... 842
3. ——— An admonition to the jury presenting to them in strong language their duty to agree if possible held not to constitute error. *Id.*..... 842
4. Case-made.—A party is entitled to appeal from and obtain a reversal of a void judgment brought to the supreme court on a case-made. *Fleeman v. Railway Co.* ..... 574
5. Consolidation of actions.—Refusal to permit the consolidation of the action with another action, in which a third party was interpleaded, was not an abuse of discretion. *McCullough v. Hayde*..... 734
6. Findings by a jury in an equitable proceeding.—Where in an equitable proceeding a jury is called to answer special questions, the court may adopt their findings or ignore them and make answers of its own, based upon an independent consideration of the testimony. *Hospital Co. v. Philippi*.....64, 68
7. Parole and discharge of prisoner held for nonpayment of costs.—Where one sentenced to fine and imprisonment is pardoned by the governor, but is held for nonpayment of costs, the district court may parole him and in six months thereafter may finally discharge him. *Mikesell v. Wilson County*..... 502
8. Receivers—compensation.—The compensation of receivers, when payment shall be made, and from what funds, is largely discretionary with the court, and it



## PRACTICE, DISTRICT COURT—CONTINUED:

- was not an abuse of discretion to order plaintiff's claim paid before that of the receiver. *Bank v. Varner* ..... 692, 696
9. Referee—conclusions of law.—Conclusions of law by a referee are not binding upon the trial court, which may, without formally setting aside the report, adopt the findings of fact and determine the law for itself. *Cemetery Association v. Hanslip*..... 21, 25
10. Referee—examination of accounts.—Where defendant demanded a jury trial it was said the case involved the examination of long accounts and was a proper one for reference. *Newton v. Toews*..... 18
11. Referee—review of evidence.—The procedure to obtain a review by the trial court of evidence taken before a referee stated. *Id.*..... 15, 19
12. Report of referee.—Under the old code a referee's report to the district court could be assailed by a motion to set it aside or by exceptions filed upon the coming in of the report. *Kelley v. Schreiber*..... 403
13. ——— It was not essential that exceptions be taken to errors occurring on the trial before the referee if such errors appeared of record. *Id.*..... 403
14. ——— The new code makes no provision for exceptions or for bills of exception. *Id.*..... 403
15. Special questions.—Certain special questions related to facts directly in issue and should have been submitted to the jury. *Watt v. Railway Co.*..... 464
16. ——— An objection because the court, in submitting special questions, informed the jury that they were submitted by the appellant was without force. *Bank v. Hart* ..... 398, 401
17. ——— Where appellant requested more definite answers to certain questions it was proper for the court to inform the jury they could answer "Yes" or "No" to the questions. *Id.*..... 398, 401
18. ——— A claim of error in the refusal to submit certain special questions to the jury not sustained. *Manley v. Railway Co.*..... 211

## PRACTICE, JUSTICE OF THE PEACE:

1. Amount in controversy—jurisdiction.—The term "city courts" in the statute limiting the jurisdiction of justices of the peace in counties where city courts are established does not include the county court of Douglas county. *McDougle v. Greenlees*..... 440
2. Forfeiture of appearance bond.—Where one charged with a misdemeanor is released on bond and at the time set for trial appears by attorney only it is within the discretion of the justice of the peace to proceed with the trial or to forfeit the bond. *The State v. Johnson*..... 450
3. Preliminary examination.—A coroner's warrant for the arrest of a person found guilty by a coroner's jury takes the place of a complaint, and is sufficient au-

**PRACTICE, JUSTICE OF THE PEACE—CONTINUED:**

thority for the holding of a preliminary examination before an examining magistrate. *The State v. Brecount* ..... 195, 199

**PRACTICE, PROBATE COURT—See GUARDIAN AND WARD, 1; WILLS, 14; TRUSTS AND TRUSTEES, 1.**

**PRACTICE, SUPREME COURT:**

See BONDS; CONTEMPT; COSTS; DISBARMENT PROCEEDINGS; DISCRETIONARY MATTERS; MANDAMUS; QUO WARRANTO.

Continuance of injunction in force by appeal.—See INJUNCTION, 2.

Notice of appeal by lessee.—See LANDLORD AND TENANT, 4, 5.

Waiver of defective pleadings.—See PLEADINGS.

Waiver of erroneous denial of new trial.—See NEW TRIAL.

1. **Abatement of action.**—The fact that a minor became of age after judgment in an action brought by his guardian did not abate the appeal by the guardian. *Mitchell v. Kelly* ..... 1, 4
2. **Abstract of the record.**—Where omissions in the abstract of the record were cured by the counter abstract a motion to dismiss was denied, but the costs of the counter abstract were taxed to appellant. *Butler v. Butler* ..... 132
3. ——— Costs not allowed for printing that part of a counter abstract which had already been printed in full in the abstract. *Mercantile Co. v. Stiefel* ..... 7, 14
4. ——— The cost of printing unnecessary matter in the abstract of the record taxed to the appellant. *Bowland v. McDonald* ..... 357
5. ——— The expense of printing abstracts and briefs held not taxable as costs unless a statement is filed within ten days after the case is decided. *McAfee v. Walker* ..... 355
6. **Case-made.**—See Nos. 31, 35.
7. **Conclusiveness of findings.**—(See, also, Nos. 37, 38.) A finding that the insured had not misrepresented his age in his application for membership in a fraternal insurance order held conclusive on review. *King v. Modern Woodmen* ..... 352
8. ——— Where there is no substantial evidence, direct or circumstantial, tending to prove a material fact, a finding that it exists can not be sustained. *Duncan v. Railway Co.* ..... 230
9. ——— Whether it was practicable to safeguard machinery and whether an employee was guilty of contributory negligence were questions of fact, and their determination upon conflicting evidence was conclusive on review. *Lewis v. Barton* ..... 163
10. ——— A finding upon conflicting testimony that an engineer injured by a derailment was not guilty of contributory negligence by exceeding the speed limit held conclusive on review. *Smith v. Railway Co.* ..... 138
11. ——— Whether a charge of fraud is sustained by positive proof is for the trial court to determine; on

## PRACTICE, SUPREME COURT—CONTINUED:

- review the only inquiry is whether the finding is supported by substantial evidence. *Mercantile Co. v. Stiefel* ..... 7, 18
12. — A determination of a question of fact, upon conflicting affidavits, on the hearing of a motion for a new trial because of accident and surprise, held not reviewable. *Yurann v. Hamilton*..... 528
13. — The evidence, which was conflicting, was sufficient to sustain the commissioner's findings of fact. *The State v. Kennedy*..... 375, 376
14. Immaterial error—evidence.—It was not material error to refuse to permit a physician to give his opinion as to the sanity of a person. *Hospital Co. v. Philippi* ..... 72
15. — Where plaintiff had substantially complied with an agreement by which he was to conduct a business until the profits aggregated a certain sum, when he was to be given half the business, in an action for a breach by the defendant a claim that the plaintiff was permitted to establish his case by secondary and incompetent evidence not sustained. *Gilbert v. Grubel*..... 476, 480
16. — Plaintiff's opinion as to the speed of an automobile was improperly excluded; but the error was rendered immaterial by explicit findings that he failed to exercise due care and that defendant was not negligent. *Himmelwright v. Baker*..... 569
17. — In an action for the contract price by a builder it was not prejudicial error to allow plaintiff to say he had fully performed the contract, in view of the evidence and findings. *McCullough v. Hayde*.... 734
18. Immaterial error—instructions.—An oral admonition, after the jury's deliberations had begun, relating to the burden of proof, held not to be reversible error. *Karner v. Railroad Company*..... 842
19. — An instruction relating to the doctrine of the "last clear chance" was sufficient, plaintiff having failed to request a proper instruction. *Himmelwright v. Baker*..... 569, 571
20. — An instruction defining the duty of a master to furnish a safe place to work held not materially erroneous because the qualifying words "exercise ordinary care" were omitted. *Kamera v. Boiler Works* ..... 432
21. — An instruction authorizing a recovery if plaintiff's injury was caused by defendant's negligence, without contributory negligence by plaintiff, was not materially erroneous for omitting to state that defendant's negligence must have been the proximate cause of an injury that ought to have been foreseen. *Martin v. Garlock*..... 266
22. — Where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries. *Barbour v. Rosedale*..... 213

PRACTICE, SUPREME COURT—CONTINUED:

23. **Immaterial error—misconduct of jury.**—Statements of facts within his personal knowledge by a juror, during the jury's deliberations, held not to be ground for a reversal. *Karner v. Railroad Company* ..... 843
24. **Immaterial error—pleadings.**—In an action for false imprisonment the failure of the officer's answer justifying the arrest to state the offense and the grounds for the arrest was not material, plaintiff being fully informed as to the nature of the charge and the cause of his arrest. *Morrison v. Pence* ..... 420, 422
25. **Judicial notice.**—See Nos. 37, 38.
26. **Limitation of actions.**—(See, also, No. 34.) A complaint of the allowance of an attorney's fee in an attachment proceeding not reviewable because not made within one year after the motion for a new trial was denied. *Dody v. Bank*..... 409
27. **Parties entitled to complain.**—In an action to quiet title a defendant who put his title in issue and was defeated could not complain because judgment was given for plaintiff against another defendant whose title was valid. *Brice v. Saylor*..... 500
28. **Parties on review.**—(See, also, No. 1.) In an action to reform a chattel mortgage and recover the proceeds of the property from a third party the mortgagors, having filed a disclaimer, were not necessary parties to an appeal by the defendant. *Stewart v. Falkenberg* ..... 576, 578
29. ——— A motion to dismiss the appeal because the appellant did not make his codefendant a party was denied. *Marks v. Chumos*..... 563
30. **Presumption on review.**—Where the evidence in a personal-injury case does not show permanent injuries it will not be inferred that the jury allowed for such injuries. *Barbour v. Rosedale*..... 213
31. **Record on review.**—Although a case-made was signed too late, it contained a transcript of the record and a motion to dismiss was denied. *Newton v. Toews* ..... 17, 18
32. ——— A bill of exceptions was signed too late. *Id.*.. 18
33. **Review of evidence.**—(See, also, Nos. 7-13, 37, 38.) Evidence taken before a referee but not brought before the district court can not be reviewed by the supreme court to determine whether it supports the findings. *Id.*..... 15, 19
34. **Review of rulings upon a demurrer.**—Rulings upon a demurrer, made more than a year before the record was filed, not reviewed. *Id.*..... 18
35. **Review of void judgment.**—A party is entitled to appeal from and obtain a reversal of a void judgment brought to the supreme court on a case-made. *Fleeman v. Railway Co.*..... 574

## PRACTICE, SUPREME COURT—CONTINUED:

36. **Transcript of the record.**—(See, also, No. 31.) A stenographer's receipt attached to a transcript was a sufficient statement of the cost thereof. *McAfee v. Walker* ..... 356
37. **Verdict based on evidence contrary to physical facts.**—Evidence examined, and the physical facts held not shown to be such as to authorize a reviewing court to say that the story told by plaintiff's witnesses was false. *Sheppard v. Storage Co.* ..... 509
38. ——— To justify an appellate court in setting aside a verdict supported by some evidence, on the ground that it is contrary to the undisputed physical facts, the inconsistency between the verdict and the facts must be conclusively demonstrated. *Id.* ..... 509

## PRELIMINARY EXAMINATION—See CRIMINAL LAW.

PREMIUM—See INSURANCE, 7, 13-15.

PRESUMPTIONS—See EVIDENCE, 7.

PRINCIPAL AND AGENT—See AGENCY.

PRINCIPAL AND SURETY—See SURETYSHIP AND GUARANTY.

PRINTING—See COSTS, 7-9.

PRIVILEGED COMMUNICATIONS—See EVIDENCE.

PROBATE COURT—See GUARDIAN AND WARD, 1; WILLS, 14; TRUSTS AND TRUSTEES, 1.

PROFITS—See PARTNERSHIP, 2, 3.

PROHIBITORY LAW—See INTOXICATING LIQUORS.

PROMISSORY NOTE—See NEGOTIABLE INSTRUMENTS.

PROPORTION—See TAXATION, 57.

PROXIMATE CAUSE—See PERSONAL INJURIES; SALES, 15.

PUBLICATION OF EXPENDITURES—See COUNTIES, 16, 18.

PUBLICATION SERVICE—See JUDGMENTS; PROCESS, 7, 12-14.

PUBLIC RECORDS—See EVIDENCE, 71; FRAUD, 14.

PUBLIC SCHOOLS—See SCHOOLS AND SCHOOL LAND.

PUNCTUATION—See WILLS, 8.

PUNITIVE DAMAGES—See DAMAGES 20, 22.

PURCHASE-MONEY LIEN—See JUDICIAL SALES, 4.

PURCHASE PRICE—See SCHOOLS AND SCHOOL LAND, 1; MONEY PAID.

PURCHASER—See SCHOOLS AND SCHOOL LAND; SALES; TAXATION.

## PROCESS:

1. **Fees of officers.**—A rehearing denied in an action to recover from a county fees claimed for official services in various actions and proceedings. *Gunning v. Wyandotte County* ..... 219
2. **Mandamus.**—The character of notice to be served upon others than the principal defendant in mandamus is immaterial, so that they are informed of the pendency of the proceeding. *The State v. Dolley*, 533, 535
3. **Notice of proceedings to forfeit school-land contract.**—(See, also, Nos. 15-17.) Where the notice of proceedings to forfeit a school-land contract is issued to one whom the record shows has assigned his interest, and notice is not given to the assignee or anyone holding under him, the proceedings can not be upheld and a subsequent sale is invalid. *Roll v. Nation*.... 675
4. ——— Where an assignment of his certificate by a purchaser of school land is recorded by the county clerk, the assignee becomes a "purchaser" and notice to forfeit the contract must be served upon him. *Id.*, 675
5. **Publication service—affidavit.**—A judgment based on a willfully false affidavit for service by publication is not absolutely void.  
*Brumbaugh v. Wilson*..... 57  
*Duphorne v. Moore*.....159, 160
6. ——— The omission of a jurat from an affidavit made the basis of judicial action was a mere irregularity, and the proceeding was not subject to collateral attack. *James v. Logan*.....285, 289
7. ——— The failure to allege that service could not be had "with due diligence" was immaterial in an affidavit for publication service. *Smith v. Land Co.*... 539
8. ——— An action to set aside a judgment based on a willfully false affidavit for publication service must be brought in two years after actual or constructive notice of the fraud. *Duphorne v. Moore*.....159, 161
9. **Publication service—age of affidavit when order is procured.**—A judgment was not void because the affidavit for publication service was sworn to thirty-seven days before the order for such service was made. *Aherne v. Investment Co.*..... 435
10. **Publication service—divorce.**—The act of 1907 makes the enforcement of foreign divorce decrees based on publication service obligatory in this state, and places such decrees on the same basis as judgments of the courts of this state. *McCormick v. McCormick* .....32, 43
11. **Publication service—notice—idem sonans.**—A default judgment quieting title, based upon service made by publishing a notice which states the defendant's name as Joseph Remer, is valid against Joseph Renner. *Puckett v. Hetzer*..... 726
12. **Publication service—notice to dead person.**—A judgment based upon publication service is void where the action is not commenced until after the person

## PROCESS—CONTINUED:

- named as defendant is dead. *Harris v. Defenbaugh* ..... 765, 768
13. **Publication service—unknown heirs.**—The term “unknown heirs” in the statute providing for publication service where it is sought to exclude defendants from any interest in real property means all kinds of heirs, including heirs of heirs of such defendants and legatees of heirs. *Howell v. Garton*..... 495
14. **Publication service—unknown heirs or devisees—order.**—Attempted service by publication upon unknown heirs or devisees held void because no order was made authorizing publication service upon such parties. *Harris v. Defenbaugh*..... 764, 768
15. **Return—description of land.**—The description of the land in a return of the service of a notice of forfeiture was sufficient and did not render the service void. *Walrond v. Noyes*..... 118, 121
16. **Return—parol evidence.**—Where the return of service of notice of a proceeding to forfeit a school-land contract was defective parol evidence was admissible to show that the service was sufficient. *Id.*..... 118, 121
17. ——— The act of 1907 permitting parol evidence of service and making certain records *prima facie* evidence of a valid forfeiture of school land was intended to operate retroactively, and is not void for that reason. *Id.*..... 119, 120

## Q.

**QUANTUM MERUIT**—See **CONTRACTS**, 38, 39.

**QUIETING TITLE:**

1. **Laches.**—Laches is ordinarily no defense in an action to quiet title or remove a cloud where the plaintiff is in possession. *Harris v. Defenbaugh*..... 765, 769
2. ——— Where the legal owner sues to quiet title against the holder of a defective tax deed less than five years old laches is not a defense because plaintiff failed to pay taxes or to record his title papers or take possession until defendant acquired his rights. *Id.* ..... 766, 773
3. **Limitation of actions.**—A suit to foreclose a mortgage against one not in privity with the mortgagor is analogous to a suit to quiet title, and the statute of limitations is not a defense. *Cooper v. Rhea*..... 109, 112
4. **Mortgage barred by limitation.**—The fact that a mortgagee in possession could not enforce his mortgage because it was barred by limitation did not give the mortgagor the right to a judgment quieting title or for possession, the mortgage debt not having been satisfied. *Capell v. Dill*..... 652
5. **Plaintiff claiming under a void tax deed and not in possession.**—Where the grantee was dead when a tax deed was executed and delivered to his heir, who recorded it and paid taxes but never took actual posses-

## QUIETING TITLE—CONTINUED:

- sion, the heir could not quiet title against, or enjoin, one in possession under the government title. *Baker v. Lane* ..... 715
6. **Pleadings—strength of plaintiff's title.**—Where defendant in an action to quiet title claims title and asks affirmative relief the rule that plaintiff must succeed on the strength of his own title does not apply. *Brice v. Sayler*..... 509
7. **Procedure—strength of plaintiff's title—defendant's title put in issue.**—After a defective forfeiture of school land a certificate was issued to a second purchaser. One who acquired an invalid tax deed paid out on the first certificate, obtained a patent, and sued to quiet title. The two holders of certificates set up their titles and asked for affirmative relief. Plaintiff was given judgment, and only the second purchaser appealed. Held, it was no longer material whether plaintiff proceeded under the statute or in equity, and appellant could not complain of defects in the tax proceedings. *Id.*..... 500
8. **Publication service.**—See JUDGMENTS; PROCESS.

## QUITCLAIM DEED—See DEEDS.

## QUO WARRANTO:

Corruption in office—See OFFICE AND OFFICERS.  
Neglect or refusal to perform official duty.—See OFFICE AND OFFICERS.

1. **Judicial discretion.**—The court has discretion in quo warranto proceedings, and is not obliged to deprive an official of his office on account of irregularities, although not sanctioning his conduct. *The State v. Kennedy* ..... 388
2. **Jurisdiction.**—A claim that the supreme court should not exercise original jurisdiction in a quo warranto proceeding involving the title to an office not sustained. *Fee v. Richardson*..... 191
3. **Other remedy available.**—A claim that quo warranto would not lie to determine the right to an office because plaintiff had an adequate remedy by mandamus or mandatory injunction not sustained. *Id.*..... 191

## R.

## RAILROADS:

Bridges.—See PERSONAL INJURIES, 48; WATERS AND WATER-COURSES, 1.

Crossings.—See PERSONAL INJURIES, 18.

Defect in rails and ties of railway track.—See PERSONAL INJURIES, 39.

Defective appliances.—See PERSONAL INJURIES, 41, 50; PLEADINGS, 3.

Duty of employee at work upon a railway track to keep lookout.—See PERSONAL INJURIES, 47.

Duty to look and listen before crossing tracks.—See PERSONAL INJURIES, 15, 16.

Fellow servants.—See PERSONAL INJURIES.

Injury to the person.—See PERSONAL INJURIES.

1. **Aid bonds.**—A railway company, having substantially complied with the conditions of the contract



## RAILROADS—CONTINUED:

- within the time stated in the proposition submitted to the voters, was entitled to have the bonds that had been voted issued. *Railroad Co. v. Scott County* .....795, 801
2. — The rule that a condition that a railroad is to be built for use within a specified time is to be reasonably construed applied. *Id.*..... 801
  3. — The decision of the county board as to whether a railway company had fulfilled the conditions of the contract so as to entitle it to the issuance of bonds voted held not conclusive. *Id.*...804, 805
  4. — Errors in the first publication of a sheriff's proclamation of an election to vote upon a railroad bond proposition held to be formal defects and not to render the election void. *Id.*.....795, 805
  5. — The statutory provision for calling a second election to vote upon a railroad-aid bond proposition does not limit the number of elections that may be called. *Id.* .....795, 806
  6. — The word "second" in such statute means "another." *Id.*.....795, 806
  7. — The statute authorizing municipalities to issue bonds in aid of railroads is not repugnant to the constitutional prohibition against the state's being a party in carrying on works of internal improvement. *Railroad Co. v. Nation*, .....345, 346
  8. — The duty of the state auditor to register and certify municipal bonds in aid of railroads stated. *Id.* .....345, 350
  9. — A showing of expenditures equal to the face value of the bonds held not a prerequisite to the registration of such bonds. *Id.*.....345, 350
  10. **Conditions imposed upon shipper accompanying stock.**—Regulations imposed upon a shipper accompanying stock to whom free transportation was given held reasonable. *Leslie v. Railway Co.*.....152, 156
  11. — A shipper of stock to whom free transportation is given must comply with the conditions of the contract, and is obliged to know whether he has time to examine his stock at stopping places and return to his place before the train proceeds. *Id.*.....152, 156
  12. — Conditions of a contract forbidding a shipper of stock to board a moving train were waived by defendant's conductor; the shipper was not a mere licensee, and the carrier was liable for damages sustained by him. *Id.*.....152, 157
  13. **Delay in furnishing cars demanded.**—In an action to recover statutory penalties for failure to furnish freight cars demanded, the one-year statute of limitation applies. *Milling Co. v. Railway Co.*.....256, 260
  14. — A penalty is incurred by a carrier for each day of neglect after the prescribed time for furnishing cars demanded, and each penalty is a distinct liability. *Id.* .....256, 261

## RAILROADS—CONTINUED:

15. ——— The subsequent furnishing of cars stops the accumulation of penalties, but does not suspend the statute as to penalties already incurred. *Id.*.....256, 261
16. ——— The duty of a carrier to provide equipment to meet the demands of the traffic stated, but in this case noncompliance with the statute was excused by unavoidable accident. *Id.*.....257, 262
17. **Discrimination.**—(See, also, No. 41.) A carrier was not a proper party to insist that an act discriminated in favor of one class of shippers as against other shippers. *Tucker v. Railway Co.*..... 225
18. **Duty to stop train to enable passenger to alight safely.**—Failure to stop a train at the destination of a passenger and afford him an opportunity to alight with safety is culpable negligence. *Walters v. Railway Co.* .....739, 741
19. **Execution of contract limiting common-law liability.**—Where a shipper used a contract under which defendant claimed the stock was shipped in order to secure a return pass he was held to have ratified the execution and signing of the contract, regardless of whether he authorized anyone to sign it for him. *Watt v. Railway Co.*..... 458
20. ——— In an action for injury to stock, whether the shipment was made under a written contract or the common law was a question of fact. *Id.*..... 458
21. **Injury by fire.**—See No. 31.
22. **Injury to goods.**—(See, also, No. 28.) The liability of a common carrier to a shipper for injury to goods stated. *Watkins v. Railway Co.*..... 308
23. ——— The defendant did not come within any of the exceptions to the liability of a common carrier. *Id.* ..... 308
24. **Injury to stock.**—See Nos. 19, 20.
25. **Negligent switching of cars—defective brake.**—While an employee of an elevator company, rightfully in a car on defendant's sidetrack, was injured by a collision with another car which defendant was switching, defendant was *prima facie* negligent; and it did not establish a complete defense by showing it was unable to stop the moving car because of a defective brake, without further explanation. *Linker v. Railroad Co.*..... 580
26. **Notice of injury and claim for damages.**—A railway company had sufficient notice of an injury to an employee and his claim for damages. *Smith v. Railway Co.* .....248, 255
27. ——— A provision that an employee would give thirty days' notice of any claim for a personal injury sustained while in defendant's employ held to have been waived. *Id.*.....136, 139
28. ——— The failure to instruct as to effect of a stipulation respecting notice to a carrier of a claim for

## RAILROADS—CONTINUED:

- loss held not material where the carrier acquired notice in time and denied liability on other grounds than lack of demand. *Watkins v. Railway Co.* . . . 308, 310
29. ——— An allegation that notice of an injury had been given as required by the fellow-servant act treated as surplusage, the negligence claimed being the failure of the master to perform a nondelegable duty. *Young v. Railway Co.* . . . 332, 334
30. ——— An agreement to give notice of a claim for personal injuries is in the nature of a forfeiture and will be strictly construed. *Smith v. Railway Co.* . . . 140
31. **Presumption of negligence.**—When facts are proved which the statute makes *prima facie* evidence of negligence the question whether such *prima facie* case is overthrown by defendant's testimony is one of fact. *Manley v. Railway Co.* . . . 211
32. **Reasonableness of rates.**—(See, also, Nos. 42-46.) An act fixing rates for transportation will not be held invalid on the ground that the rates are unreasonable without the fullest disclosure of all material facts affecting the question. *Tucker v. Railway Co.* . . . 223, 228
33. **Rules for trainmen—knowledge that signals are seen.**—A rule requiring a brakeman to know that a signal to an engineer has been seen, understood and obeyed before placing himself in a dangerous position held to be reasonable. *Bowers v. Railway Co.*, 95, 102
34. ——— The word "know," as used in this rule, defined. It does not necessarily import absolute knowledge. *Id.* . . . 95, 103
35. **Signals.**—See Nos. 33, 34; **PERSONAL INJURIES**, 47.
36. **Speed of a train.**—A finding upon conflicting testimony that an engineer injured by a derailment was not guilty of contributory negligence by exceeding the speed limit held conclusive on review. *Smith v. Railway Co.* . . . 138
37. **Transportation of oil—maximum rates.**—(See, also, No. 17.) The act of 1905 establishing maximum rates for the transportation of oil contains but one subject, which is clearly expressed in its title. *Tucker v. Railway Co.* . . . 222, 224
38. ——— Damages recoverable by a shipper under the law fixing maximum rates for the transportation of oil do not constitute a fine for the breach of a penal law. *Id.* . . . 222, 224
39. ——— The distinction between "single-line rates" and "double-line rates" in the act fixing maximum rates for transporting oil is between rates for shipment over a single line and rates for shipment over more than one line. *Id.* . . . 222, 224
40. ——— The law fixing maximum rates for transporting oil does not deprive a carrier of the equal protection of the laws because more than two lines of road are not regulated. *Id.* . . . 224

## RAILROADS—CONTINUED:

41. — The legislature may segregate oil from other commodities and make its transportation the subject of special regulation, and to secure observance of such regulation may impose special penalties. *Id.* ..... 222, 224
42. — The act establishing maximum rates for the transportation of oil does not forbid a judicial investigation of the reasonableness of the rates fixed by the legislature. *Id.* ..... 222, 225
43. — An opportunity to test in a single suit the reasonableness of legislative rates is not essential to the protection of a carrier claiming that such rates are unreasonable. *Id.* ..... 222, 226
44. — It is enough that the carrier can not be made to suffer the penalties prescribed until the question of reasonableness has been judicially determined. *Id.* ..... 222, 226
45. — The penalties prescribed by the act fixing maximum rates for the transportation of oil are not so oppressive that their natural effect is to intimidate carriers from resorting to the courts to test the statute. *Id.* ..... 223, 226
46. — Evidence held insufficient to show that the rates fixed by the act of 1905 for transporting oil are unreasonable. *Id.* ..... 223, 228

RATES—See RAILROADS, 37-46.

RATIFICATION—See AGENCY, 7-9, 11; DAMAGES, 12.

RECEIPT—See COSTS, 11.

RECEIVERS—See BONDS; FEES AND SALARIES.

RECIPROCAL DEMURRAGE LAW—See RAILROADS, 13-16.

## RECORD:

Abstract.—See PRACTICE, SUPREME COURT.  
 Assignment of school-land certificate.—See SCHOOLS AND SCHOOL LAND, 11, 12.  
 Bill of exceptions.—See EVIDENCE, 6, 73, 74.  
 Case-made.—See JURISDICTION, 10.  
 Chattel mortgage.—See MORTGAGES, 2.  
 Deeds.—See DEEDS.  
 Evidence.—See EVIDENCE.  
 Lost or destroyed.—See HIGHWAYS, 7; JUDGMENTS, 35.  
 Notice of fraud.—See FRAUD, 14.  
 Notice to purchaser.—See DEEDS, 26-40.  
*Prima facie* evidence of forfeiture.—See SCHOOLS AND SCHOOL LAND, 15, 17.  
 Transcript.—See PRACTICE, SUPREME COURT.  
 Wills.—See ACTIONS AND REMEDIES, 27; WILLS.

REDEMPTION—See JUDICIAL SALES, 4; TAXATION.

REFEREE—See PRACTICE, DISTRICT COURT, 9-14.

REFORMATION—See CONTRACTS; TAXATION, 42.

REGISTRATION OF BONDS—See BONDS, 5, 6.

REINSTATEMENT—See INSURANCE, 1, 23, 24.

REMAINDER—See WILLS, 21.

**REMEDIES**—See **ACTIONS AND REMEDIES**.

**RENEWAL CONTRACT**—See **INSURANCE**, 7, 9.

**RENT**—See **DAMAGES**, 33, 34; **LANDLORD AND TENANT**, 4, 7; **MINES AND MINERALS**, 1, 9, 10.

**REPEAL**:

Franchise ordinance.—See **CITIES AND CITY OFFICERS**, 12, 18.  
Implied repeal.—See **SCHOOLS AND SCHOOL LAND**, 5.

**REPLEVIN**:

1. **Action on bond for damages**.—Where a successful defendant in replevin brought an action for damages on the replevin bond, loss of time, attorney's fees and expenses incurred in defending the replevin action were not recoverable, in the absence of malice or bad faith in bringing the replevin action. *Lake v. Hargis* ..... 711
2. ——— The word "damages," as used in a replevin bond, refers to damages that may be occasioned to the defendant by the detention of the property and by its loss if not returned when a return is adjudged. *Id.* ..... 714
3. **Burden of proof**.—In replevin by a mortgagee of chattels, where the defense was that plaintiff lacked capacity to sue and that the property was exempt, the burden of proof was upon the defendant. *Colean v. Johnson*..... 655
4. **Custodian**.—(See, also, No. 7.) In a replevin suit a custodian might have relieved himself from costs by filing a disclaimer or an offer to surrender possession. *Lemaster v. Fisher*..... 282
5. **Defenses provable under a general denial**.—Under a general denial in a replevin action defendant may defeat a recovery by plaintiff by showing it is a foreign corporation and not entitled to maintain the action. *Colean v. Johnson*..... 656
6. ——— It is the Kansas rule and practice that in replevin cases every defense, general or special, meritorious or technical, may be made under a general denial. *Id.*..... 658
7. **Demand**.—A demand was not a condition precedent to a replevin action by a chattel mortgagee against a custodian who claimed no interest in the property. *Lemaster v. Fisher*..... 282
8. **Judgment**.—Where a plaintiff in replevin retained possession and prevailed in the action an alternative judgment for the value of the property in case a return could not be had was unnecessary. *Colean v. Johnson* ..... 656
9. **Pleadings**.—A petition in replevin by a chattel mortgagee stated a cause of action as against an objection to the evidence. *Lemaster v. Fisher*..... 281
10. **Property removed without mortgagee's consent**.—Where a chattel mortgage allowed the mortgagor to

**REPLEVIN—CONTINUED:**

keep the property at a certain place, he had no right to hold possession at another place without the knowledge or consent of the mortgagee. *Id.*..... 280

11. ——— A provision in a chattel mortgage that if the "indebtedness shall be deemed insecure" the property might be taken from the mortgagor construed. *Id.* ..... 280, 282

**REPLY—**See PLEADINGS, 2.

**REPORT OF REFEREE—**See PRACTICE, DISTRICT COURT.

**REPUTATION—**See EVIDENCE, 34.

**RESCISSION—**See CONTRACTS.

**RESERVE FUND—**See INSURANCE, 13-15.

**RESIDENCE—**See ATTACHMENT, 4; CORPORATIONS, 6, 7, 18, 19; DIVORCE AND ALIMONY, 2, 3; PARENT AND CHILD, 1; WILLS, 19, 20.

**RES JUDICATA—**See JUDGMENTS.

**RESOLUTIONS—**See CITIES AND CITY OFFICERS, 1.

**RESPONDEAT SUPERIOR—**See CITIES AND CITY OFFICERS, 12, 13.

**RETROSPECTIVE LAWS—**See CONSTITUTIONAL LAW.

**RETURN OF PROCESS—**See PROCESS.

**REVERSION—**See BANKRUPTCY, 1.

**REVOCATION—**See WILLS.

**RIPARIAN OWNERS—**See WATERS AND WATERCOURSES.

**ROADS—**See HIGHWAYS.

**RULES AND REGULATIONS—**See PERSONAL INJURIES, 25; RAILROADS, 10, 33, 34.

**S.**

**SALARIES—**See FEES AND SALARIES.

**SALES:**

See DEEDS; JUDICIAL SALES; SCHOOLS AND SCHOOL LAND; TAXATION.

Assignment of insurance policy.—See INSURANCE.

Corporate stock issued in exchange for property.—See CORPORATIONS, 10, 17.

Corporate stock sold at a discount.—See CORPORATIONS, 11, 12, 16.

Homestead—joint consent.—See HOMESTEADS AND EXEMPTIONS.

Payment—bank check.—See NEGOTIABLE INSTRUMENTS, 5, 6; SPECIFIC PERFORMANCE, 12.

Power to issue or sell stock.—See CORPORATIONS.

Purchase-money lien.—See JUDICIAL SALES, 4.

Purchase of cotenant's share after lien has attached.—See MCHANIC'S LIEN, 1.

Recovery of money paid.—See MONEY PAID.

Specific performance.—See SPECIFIC PERFORMANCE.

Statute of frauds.—See FRAUD; SPECIFIC PERFORMANCE.

1. Abstract of title.—In determining whether a title is so doubtful that specific performance will not be decreed the court is not required to pass upon the va-

## SALES—CONTINUED:

- lidity of the title, as the judgment would not bind parties not before the court whose possible claims might affect the title. *McNutt v. Nellans*..... 428
2. ——— A vendor whose title is defective is entitled to a reasonable time within which to perfect it. *Id.*.... 426
3. ——— Equity will not compel a purchaser under an executory contract for the sale of land to accept the title if doubtful or unmarketable. *Id.*..... 424
4. ——— The title is doubtful if it exposes the party holding it to the hazard of litigation. *Id.*..... 424
5. ——— The title tendered was so doubtful that the vendee should not be compelled in equity to accept it. *Id.* ..... 424
6. ——— A stipulation in a contract of sale to deliver a satisfactory abstract of title was not merged in a warranty deed and a purchase-money mortgage executed by the vendee contemporaneously with the contract. *Read v. Loftus*..... 485, 490
7. ——— If a deed be accepted as performance of the conditions of the contract, it supersedes a stipulation as to title; but if the parties intend that the stipulation shall remain in effect, it will not be merged in the deed. *Id.*..... 485
8. ——— Taking possession and improving property held not conclusive evidence of the waiver of an agreement to furnish satisfactory title. *Id.*..... 485, 492
9. ——— Retention of possession for a reasonable time in reliance on a vendor's promise to perfect title is not such proof of laches as will necessarily defeat a rescission of the contract. *Id.*..... 485, 492
10. ——— Where parties agree that title shall be made satisfactory to the vendee the court is not called upon to determine the validity of objections made to the title. *Id.*..... 493
11. ——— Where title was to be made satisfactory to the vendee, in a suit by him to rescind the contract it was unnecessary for him to introduce in evidence the abstract furnished. *Id.*..... 493
12. ——— In an action to rescind a contract for failure to make title as provided in the contract allegations that the vendor had made false representations concerning the title treated as surplusage. *Id.*..... 494
13. ——— The fact that before making a contract the vendee consulted an attorney concerning the title did not deprive him of the right to secure such guaranties and make such conditions concerning the title as the vendor was willing to concede. *Id.*..... 494
14. **Agent's commission.**—The evidence held sufficient to make a *prima facie* case in favor of plaintiff in an action to recover a real-estate broker's commission. *Putnam v. King*..... 216
15. ——— In an action between two agents to recover a commission for a sale, the land having been listed

## SALES—CONTINUED:

- with each of them, the plaintiff was the procuring cause of the sale and entitled to judgment. *Gregory v. Kennedy* ..... 565
16. ——— Where the sole question is whether plaintiff is entitled to recover on a contract, and there is no dispute concerning the amount, a verdict for half the amount claimed should be set aside as contrary to the evidence at the instance of either party. *Bressler v. McVey* ..... 341
17. **Appraisement—performance of conditions.**—Where a contract stipulated that a vendor might repurchase at an appraised value, a petition sufficiently alleged performance of the conditions respecting appraisement, in the absence of a motion to make more definite. *Wilber v. Ronnau*.....171, 174
18. **Conveyance by a bankrupt during pendency of proceedings.**—Where, during bankruptcy proceedings, a bankrupt conveys all his interest in the property, after his discharge the reversionary title to any property undisposed of vests in the bankrupt's grantee. *Robertson v. Howard*..... 588
19. **Description of land in memorandum—parol evidence.**—Where a memorandum described land as in a certain county and of a certain quantity, the description did not satisfy the statute of frauds, and a petition asking performance of the contract was demurrable, although it stated that defendant recently showed plaintiff a tract of the size mentioned, in the county referred to. *Hampe v. Sage*.....728, 730
20. ——— If the memorandum had stated that the land described was the tract recently shown to plaintiff by defendant proof that a particular tract had been so shown might have been permissible. *Id.*..... 731
21. ——— Parol evidence is admissible to apply a description, but not to supply it. *Id.*..... 733
22. **Exchange of land—offer and acceptance.**—A writing construed as an agreement for the exchange of lands and the payment in cash of the net difference between the agreed prices. *Id.*.....728, 730
23. **False representations.**—See FRAUD, 14, 15.
24. **Mistake of law.**—One who, under a mistake of law, accepted stock of no value in part payment for his land had no recourse against the purchaser. *Cemetery Association v. Hanslip*..... 27
25. **Mortgaged personalty.**—(See, also, MORTGAGES, 2, 8, 11.) A mortgagor of chattels may with the oral consent of the mortgagee make a valid sale of the property to a purchaser in good faith, notwithstanding the statute making it a misdemeanor to dispose of mortgaged chattels without the written consent of the mortgagee. *Reese v. Kapp*..... 304
26. **Notice to purchasers.**—A tax roll affords notice to certain purchasers that the person designated thereon is owner of the premises. *Matthewson v. Hevel*..... 135



## SALES—CONTINUED:

27. ——— The record of a judgment annulling a grantor's title but voidable on the ground of fraud held to be notice to a purchaser from the time of the perpetration of the fraud. *Duphorne v. Moore*.....159, 161
28. ——— Where land was awarded to a husband in a divorce suit, a lessee from the husband was bound to know that an appeal had been taken, and his leasehold was taken at the risk of a reversal of the judgment. *Kremer v. Schutz*.....175, 176
29. ——— One who leased land from the party to whom it was awarded by the trial court was bound by the result of the appeal, although no supersedeas bond was given. *Id.*.....175, 177
30. ——— The rights of a purchaser whose vendor's title was quieted by a judgment rendered upon publication service discussed. *McNutt v. Nellans*..... 427
31. ——— A purchaser in reliance upon a judgment rendered upon publication service held to be a purchaser in good faith, although there was a quitclaim deed in his chain of title. *Smith v. Land Co.*..... 539
32. ——— Where a conveyance is not recorded a second purchaser from the same grantor, to be protected by the recording act, must show that he paid a valuable consideration.  
*Kruse v. Conklin*.....358, 362  
*Doty v. Bitner*.....551, 552
33. ——— Recitals in the conveyance of the payment of consideration are not evidence against strangers.  
*Kruse v. Conklin*.....358, 362  
*Doty v. Bitner*.....551, 552
34. ——— Upon proof of the payment of a valuable consideration the presumption arises that the second purchaser acted in good faith and without notice.  
*Kruse v. Conklin*.....358, 363  
*Doty v. Bitner*.....551, 552
35. ——— An unrecorded conveyance of real estate is good except as against one purchasing without notice and for a valuable consideration. *Kruse v. Conklin* .....358, 362
36. ——— In an action of ejectment a demurrer to the defendant's evidence was improperly sustained. *Hughes v. Delautre*..... 548
37. ——— The holder of a quitclaim deed who failed to show that he paid a valuable consideration had no standing to claim a benefit from the failure of a prior grantee of the same grantor to record his conveyance. *Doty v. Bitner*..... 551
38. ——— The statute providing that a purchaser in good faith, without knowledge of a will, deriving title from heirs of a nonresident, shall not be defeated by production of the will unless it is offered for record within two years of the final probate does not protect a tax-deed holder. *Harris v. Defenbaugh*...765, 768

## SALES—CONTINUED:

39. ——— In order to bring himself within its protection he must be a purchaser in good faith and have acquired from the testator or the heirs or devisees of the testator. *Id.*.....765, 768
40. ——— A defendant in a suit to quiet title who was served only by publication and who had the judgment vacated after the land had been sold to an innocent purchaser held entitled to a judgment against the plaintiff for its value. *Smith v. Land Co.* ..... 539
41. Warranties.—Where after land was leased for crop rent and the tenant paid \$100 for the hay crop the landlord conveyed, warranting against encumbrances, the grantee was entitled to recover but \$100 for breach of warranty, having ratified the lease by accepting the landlord's share of the other crops. *Chase v. Barnes.*..... 28
42. ——— Under the testimony and the general finding it was assumed that the trial court held there was no failure of consideration for a sale with a warranty. *Colean v. Johnson.*..... 657

SALOON KEEPER—See DAMAGES, 1.

SATISFACTION—See ACCORD AND SATISFACTION.

## SCHOOLS AND SCHOOL LAND:

1. Appraisement—fraudulent undervaluation.—In an action to set aside the appraisement of school land and cancel the certificate of purchase the evidence was insufficient to sustain the charge of fraudulent undervaluation. *The State v. White.*..... 777
2. Assignment of certificate.—(See, also, Nos. 11, 12, 19.) A second purchaser of school land, after learning that the forfeiture of the original contract was invalid, may take an assignment from the first purchaser and perfect his rights under the original certificate. *Roll v. Nation.*..... 675
3. County high schools.—The statute known as the "Barnes law" is not unconstitutional upon the ground that it violates section 16 of article 2 of the constitution. *Board of Education v. Allen County.*...782, 786
4. ——— The duty of county commissioners to make a tax levy for the maintenance of high schools under the "Barnes law" stated. *Board of Education v. Allen County.*..... 782  
*School District v. Wilson County.*..... 806
5. ——— The power of the county commissioners under the act of 1905 to levy taxes for the support of high schools is superseded by enactments of 1907 and 1909. *Board of Education v. Allen County.*..... 786
6. ——— The statutory provision for submitting to voters the question of an increased levy for high-school purposes is permissive, and failure to adopt

## SCHOOLS AND SCHOOL LAND—CONTINUED:

- this method is not a matter of estoppel in an action to compel the county board to make a levy within the statutory limitations. *Id.*..... 786
7. **Execution sale—equitable interest of purchaser.**—  
A holder of a certificate to school land, having paid part of the purchase price, was the equitable owner of the land. *Robertson v. Howard*..... 588
8. ——— His equitable interest in such land was real estate, and as such was subject to sale on execution. *Id.* ..... 588
9. **Fines for breach of penal law.**—See RAILROADS, 38.
10. **Forfeiture.**—(See, also, No. 2.) There was sufficient evidence to show that a forfeiture of school land had been declared. *Davis v. Nation*..... 411
11. ——— Where an assignment of his certificate by a purchaser of school land is recorded by the county clerk, the assignee becomes a “purchaser” and notice to forfeit the contract must be served upon him. *Roll v. Nation*..... 675
12. ——— Where the notice of proceedings to forfeit a school-land contract is issued to one whom the record shows has assigned his interest, and notice is not given to the assignee or anyone holding under him, the proceedings can not be upheld and a subsequent sale is invalid. *Id.*..... 675
13. ——— Where the return of service of notice of a proceeding to forfeit a school-land contract was defective parol evidence was admissible to show that the service was sufficient. *Walrond v. Noyes*....118, 121
14. ——— The description of the land in a return of the service of a notice of forfeiture was sufficient and did not render the service void. *Id.*.....118, 121
15. ——— Notations in a book in which school-land sales are recorded held *prima facie* evidence that a purchaser's contract was forfeited at the date stated. *Id.* ..... 118
16. ——— A purchaser of school land was probably estopped to deny that the forfeiture of his contract was valid. *Id.*..... 122
17. ——— The act of 1907 permitting parol evidence of service and making certain records *prima facie* evidence of a valid forfeiture of school land was intended to operate retroactively, and is not void for that reason. *Id.*.....119, 120
18. ——— After a defective forfeiture of school land a certificate was issued to a second purchaser. One who acquired an invalid tax deed paid out on the first certificate, obtained a patent and sued to quiet title. The two holders of certificates set up their titles and asked for affirmative relief. Plaintiff was given judgment, and only the second purchaser appealed. Held, it was no longer material whether

**SCHOOLS AND SCHOOL LAND—CONTINUED:**

- plaintiff proceeded under the statute or in equity, and appellant could not complain of defects in the tax proceedings. *Brice v. Saylor*..... 500
19. **Improvements—ownership.**—Where an assignee of a school-land certificate purchases from the assignor the improvements on the land and takes possession he becomes the owner of the improvements and is entitled to a patent upon completion of the purchase under the certificate; and a sale of the land for the appraised value, separate from the improvements, is proper. *Schmidt v. Nation*..... 821
20. **Limitation of actions by a purchaser.**—The statute requiring the purchaser of school land to sue to enforce his rights within six months after the act took effect is not void on the ground that it fails to give a reasonable time within which to begin such action. *Davis v. Nation*..... 410
21. **Sale by a foreign trustee in bankruptcy—jurisdiction.**—A sale of a certificate of school land situated in this state by a foreign trustee in bankruptcy was made without jurisdiction, and conveyed no interest in the land to the purchaser. *Robertson v. Howard*.... 588

**SECONDARY EVIDENCE**—See EVIDENCE, 67.

**SECTION MEN**—See PERSONAL INJURIES, 33.

**SERVICE OF PROCESS**—See PROCESS.

**SETTLEMENT**—See ACCORD AND SATISFACTION; GUARDIAN AND WARD.

**SHADE TREES**—See CITIES AND CITY OFFICERS, 14.

**SHERIFF**—See ELECTIONS, 3; JUDICIAL SALES; PROCESS.

**SHIPPERS**—See RAILROADS.

**SIGNALS**—See PERSONAL INJURIES, 47; RAILROADS, 33, 34.

**SIGNATURE**—See CONTRACTS, 4, 5, 72; BONDS, 1, 2; WILLS, 22, 25, 26; CRIMINAL LAW, 9, 10; PLEADINGS, 11; OFFICE AND OFFICERS, 9.

**SPECIAL FINDINGS**—See JURY AND JURORS.

**SPECIAL QUESTIONS**—See JURY AND JURORS.

**SPECIFIC PERFORMANCE:**

1. **Description of land in memorandum insufficient.**—Where a memorandum described land as in a certain county and of a certain quantity, the description did not satisfy the statute of frauds, and a petition asking performance of the contract was demurrable, although it stated that defendant recently showed plaintiff a tract of the size mentioned, in the county referred to. *Hampe v. Sage*..... 728, 730
2. ——— If the memorandum had stated that the land described was the tract recently shown to plaintiff by defendant proof that a particular tract had been so shown might have been permissible. *Id.*..... 731

## SPECIFIC PERFORMANCE—CONTINUED:

3. **Doubtful or unmarketable title.**—Equity will not compel a purchaser under an executory contract for the sale of land to accept the title if doubtful or unmarketable. *McNutt v. Nellans*..... 424
4. ——— The title is doubtful if it exposes the party holding it to the hazard of litigation. *Id.*..... 424
5. ——— The title tendered was so doubtful that the vendee should not be compelled in equity to accept it. *Id.* ..... 424
6. ——— The rights of a purchaser whose vendor's title was quieted by a judgment rendered upon publication service discussed. *Id.*..... 427
7. ——— In determining whether a title is so doubtful that specific performance will not be decreed the court is not required to pass upon the validity of the title, as the judgment would not bind parties not before the court whose possible claims might affect the title. *Id.*, 428
8. ——— Where parties agree that title shall be made satisfactory to the vendee the court is not called upon to determine the validity of objections made to the title. *Read v. Loftus*..... 493.
9. **Estoppel to assert invalidity of contract.**—In an action to recover purchase money the defendant, who with his wife executed a deed and asked specific performance, was estopped to claim the contract was void because the land was a homestead and the wife did not join in the contract. *McNutt v. Nellans*..... 424, 428
10. **Grounds.**—Where an oral agreement for the sale of real estate has been partly performed, the ground upon which complete performance may be compelled stated. *Baldridge v. Centgraf*..... 240.
11. ——— Mere possession by the proposed buyer, with the owner's consent, does not avoid the statute and justify such a decree. *Id.*..... 240.
12. ——— Nor does the fact that the plaintiff, before so taking possession, deposited a valid check for the purchase price with a third person, to be delivered upon the execution of a deed, justify a decree for specific performance. *Id.*..... 240
13. ——— One who takes possession of land under an oral contract to purchase is not a trespasser in fact, and specific performance is not necessary to protect him from liability as such. *Id.*..... 244
14. **Judicial discretion.**—Whether courts shall decree specific performance always rests in their sound judicial discretion. *McNutt v. Nellans*..... 428.
15. **Unconscionable contract.**—Equity will not enforce an unconscionable contract; but the mere fact that one provision of a legal contract, or even the entire contract, is more favorable to one party than to the other does not ordinarily render it unconscionable. *Brick Co. v. Gas Co.*..... 752, 755.

**SPEED OF AN AUTOMOBILE**—See **PERSONAL INJURIES**, 55.

SPEED OF A TRAIN—See PERSONAL INJURIES, 8.

STATE AUDITOR—See MANDAMUS.

STATUTE OF FRAUDS—See FRAUD; SPECIFIC PERFORMANCE.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

**STATUTES:**

Repeal by implication.—See SCHOOLS AND SCHOOL LAND, 5.  
Title of an act.—See CONSTITUTIONAL LAW.

**STATUTES CITED, CONSTRUED OR APPLIED:**

**BILL OF RIGHTS:**

§ 10 ..... 794

**CONSTITUTION OF KANSAS:**

Art. 1, § 7 ..... 504  
1, § 10 ..... 504  
2, § 16 ..... 756, 760  
782, 786  
2, § 21 ..... 810, 819  
3, § 3 ..... 191  
6, § 6 ..... 222, 224  
11, § 1 ..... 825, 826  
11, § 8 ..... 345, 346  
348, 350  
15, § 6 ..... 556, 557

**CIVIL CODE (NEW):**

§ 15 ..... 290  
17, subdiv. 4 ..... 260  
79, 80 ..... 499  
83 ..... 427, 470, 496  
110 ..... 505  
192, 254 ..... 714  
307 ..... 738  
320 ..... 577, 579  
336, 347, 352, 356, 357, 287  
503 ..... 555  
542 ..... 696  
578 ..... 318  
581 ..... 31, 281  
595 ..... 553  
596, subdiv. 4 ..... 471  
649 ..... 556, 557

**CIVIL CODE (OLD):**

§ 17 ..... 520  
17, subdiv. 4 ..... 260  
18, subdiv. 3 ..... 161  
73 ..... 540  
77 ..... 427, 435, 438  
439, 496, 540  
78 ..... 765, 768  
81 ..... 177  
104, 105 ..... 329  
122 ..... 335  
140 ..... 281  
192, 242 ..... 714  
292 ..... 18

**CIVIL CODE (OLD):**

§ 298 ..... 408  
295 ..... 19, 403, 404  
310 ..... 328  
322 ..... 576, 579  
341 ..... 287  
345 ..... 287  
354 ..... 287  
358 ..... 287  
359 ..... 287  
467 ..... 178  
542<sup>a</sup> ..... 578  
568, subdiv. 3 ..... 109, 111  
572 ..... 111  
587 ..... 282

**CIVIL CODE—JUSTICES:**

§ 1 ..... 440, 441  
84 ..... 837  
121 ..... 79

**CRIMINAL CODE:**

§ 36 ..... 199  
72 ..... 391  
207, 245 ..... 454, 455, 456  
253 ..... 504, 509

**CRIMINAL CODE—JUSTICES:**

§ 20 ..... 454

**GENERAL STATUTES OF 1868:**

Ch. 21, § 7 ..... 524  
22, § 2 ..... 271  
23, § 74 ..... 85  
25, § 35 ..... 384  
25, § 127-130 ..... 199  
25, § 180 ..... 373, 374  
376, 385  
31, § 10 ..... 195, 198  
31, § 131 ..... 393  
32 ..... 181  
40, art. 1, § 1 ..... 185  
40, art. 3, § 13 ..... 183  
43, § 5 ..... 564  
55, § 25 ..... 125  
62, § 1 ..... 557  
68, § 9 ..... 282  
68, § 15 ..... 281  
80, § 78 ..... 498

STATUTES CITED, CONSTRUED OR APPLIED—CON-  
TINUED:

## GENERAL STATUTES OF 1868:

Ch. 104, § 1, subdiv. 8...	588
	594
110, § 48 .....	192
117, § 11, 12 .....	293
117, § 37 .....	297
117, § 50 .....	768

## GENERAL STATUTES OF 1901:

Ch. 32 .....	181
§ 642 .....	193, 195
1252, 1342 .....	85
1768-1771 .....	199
1983 .....	133
1995 .....	195, 198
3030 .....	516, 517
3031 .....	219
3071 .....	185
3084 .....	183
3274-3305 .....	2
3869 .....	125
4512 .....	498
4538, 4539 .....	329
4758 .....	328
5923 .....	212
6339 .....	780
6345 .....	781
6346 .....	781, 823
6356 .....	678, 679
6360 .....	823
7380 .....	182
7466 .....	184
7659-7661 .....	59, 61
7662 .....	136
7672 .....	59, 63, 142, 146
7677 .....	145, 146
7814 .....	192
7948 .....	293

## GENERAL STATUTES OF 1909:

Ch. 14, art. 2 .....	373, 377
28, art. 5 .....	502, 504, 506
55, art. 5 .....	697
79 .....	337
95 .....	403
§ 537-552 .....	534
581 .....	351
658 .....	709
994 .....	862
1374 .....	418, 776
1387 .....	418
1644 .....	524
1651 .....	272
1907 .....	576, 579
2099 .....	384
2309 .....	373, 374, 376, 385
2468 .....	502, 508
2578 .....	853, 854
2621 .....	392, 393

## GENERAL STATUTES OF 1909:

§ 3676 .....	377
3837 .....	564
3838 .....	564, 729
3961-3965 .....	225
4216 .....	697, 698
4221 .....	698
4226 .....	698, 702
4227 .....	697, 699
4241 .....	697, 701
4361 <i>et seq.</i> .....	763
4371 .....	756, 759
4378 .....	502, 504, 509
4676-4683 .....	604, 636
4679 .....	840
4872 .....	556, 557
5224 .....	282
5230 .....	281
5239 .....	304, 307
5277 .....	524
6361 .....	441
6998 .....	634
6999 .....	248, 249, 332
7027 .....	795, 806
7049 .....	345, 347, 349, 351
7053 .....	345, 347
7163-7165 .....	222, 223
7200 <i>et seq.</i> .....	260
7359-7369 .....	814
7692-7696 .....	679
7695 .....	410, 411
7792 <i>et seq.</i> , 809, 811, 812	7796 .....
7796 .....	783, 785
7797 .....	783
9037, subdiv. 8 .....	588, 594
9214 .....	825
9215, 9229 .....	826
9240 .....	418
9328 .....	418
9329 .....	418
9381 .....	418
9388 .....	418
9390 .....	418
9391 .....	419
9394 <i>et seq.</i> .....	809
9408 .....	783, 811
9420 .....	784, 785
9423 .....	820
9465, 9466 .....	519
9481 .....	419
9483 .....	520, 545
9786 .....	291
9787 .....	291, 296
9814 .....	297
9827 .....	765, 768

## LAWS OF 1865:

Ch. 12 .....	346
--------------	-----

STATUTES CITED, CONSTRUED OR APPLIED—CON-  
TINUED:

LAWS OF 1870:	
Ch. 93, § 1	634
LAWS OF 1872:	
Ch. 100, § 43	418
181	366
193, § 1	184
194, § 1	182, 184
LAWS OF 1874:	
Ch. 39, § 6	351
93, § 1	635
LAWS OF 1876:	
Ch. 34, § 1	825
34, § 52, 53, 70, 82,	418
34, § 85	419
34, § 128	519
34, § 139	419
34, § 141	520, 545
122, art. 14, § 5	781
122, art. 14, § 6, 781,	823
122, art. 14, § 20	823
LAWS OF 1879:	
Ch. 161, § 2	678, 679
LAWS OF 1881:	
Ch. 128, § 16, 756, 759, 760	
128, § 19	760
LAWS OF 1885:	
Ch. 104, § 2	85
132, § 9, 15	698
132, § 20	702
132, § 21	699
155, § 1	212
LAWS OF 1887:	
Ch. 165, § 5	502, 504, 509
183, § 1	795, 806
215, § 1	86
215, § 2	88
215, § 3	87
230	193, 195
237, § 1	709
LAWS OF 1889:	
Ch. 248, § 1	145, 146
LAWS OF 1891:	
Ch. 162	59, 61
LAWS OF 1893:	
Ch. 110, § 2	136, 519
110, § 4, 59, 63, 142,	146
LAWS OF 1897:	
Ch. 107	190, 192
176, § 1, 2	86, 88
264	192
LAWS OF 1899:	
Ch. 93, § 1	441
139, § 1	854

LAWS OF 1899:	
Ch. 141, § 1	219, 377
	516, 517
248, § 8	418
LAWS OF 1901:	
Ch. 105	304, 306
132, § 2	133
278, § 2	578
350, § 1	780
LAWS OF 1903:	
Ch. 122, § 14	193, 195
122, § 130	862
153	576, 579
212	190
356, § 163, 164, 604,	636
356, § 4	840
385	498
LAWS OF 1905:	
Ch. 116, § 1	418, 774
193	190, 193
266, § 1	564, 729
273, § 2	697, 701
310, § 31	524
315	225
320	17, 20
326, § 435, 436, 438,	498
326, § 1	497
341, § 1	249
345	260, 262
353	222, 223
397	809, 811, 812
397, § 1	786
397, § 5	783, 785
526, § 1	291
LAWS OF 1907:	
Ch. 178	502, 504, 506
178, § 10	502, 508
184, § 1, 32, 43, 49,	52
257	499
281, § 1	248, 332
286, § 1	345, 346
	350, 351
286, § 2	347
333	782, 783, 786
	809, 811
373	119, 120, 679
373, § 4	410, 411
408, § 1	826
430, § 1	296
LAWS OF 1908:	
Ch. 52	574
80, § 1	826



## STATUTES CITED, CONSTRUED OR APPLIED—CONTINUED:

## LAWS OF 1909:

Ch. 61 .....	534
62, § 8 .....	200, 201, 202
91, § 1 .....	200, 202
164 .....	763
182 .....	403
201 .....	813, 818, 820

## LAWS OF 1909:

Ch. 244, § 1 .....	418
245 .....	809, 811
245, § 15 .....	782, 783
245, § 27 .....	784, 785
256, § 1 .....	820

## STATUTORY CONSTRUCTION:

1. **Adopted statutes.**—None of the sections of the factory act is a transcript from the law of any other state and consequently had not been given a settled and definite meaning by the highest court of any other state when the statute was enacted. *Caspar v. Lewin* ..... 604, 612
2. **Constitutionality.**—(See, also, Nos. 7-9.) An act fixing rates for transportation will not be held invalid on the ground that the rates are unreasonable without the fullest disclosure of all material facts affecting the question. *Tucker v. Railway Co.* .... 223, 228
3. ——— A court will undertake to pass upon the validity and effect of a statute only when necessary to the determination of an actual and concrete controversy. *The State v. Dolley* ..... 533, 536
4. **Mandatory or directory provisions.**—The statutory provision for submitting to voters the question of an increased levy for high-school purposes is permissive, and failure to adopt this method is not a matter of estoppel in an action to compel the county board to make a levy within the statutory limitations. *Board of Education v. Allen County* ..... 786
5. **Manifest error in the use of words.**—In the statute forbidding the embezzling by an officer of the state of money "belonging to such estate," the word "estate" is manifestly intended for "state," and must be so construed. *The State v. Radford* ..... 853
6. **Misinterpretation—estoppel.**—The fact that in previous similar cases the city acted upon a misinterpretation of the statute in assessing street improvements does not estop it from now proceeding according to law. *Bowlus v. Iola* ..... 774
7. **Title of an act.**—In determining whether a statute is within the title of the act the title will be liberally interpreted for the purpose of upholding the law. *The State v. Topeka Club* ..... 756, 760
8. ——— It is not necessary that the title contain every detail of the entire act. It will be sufficient if it fairly indicates, though in general terms, its scope and purpose. *Id.* ..... 756, 760
9. ——— Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the body of the act without violating the constitutional inhibition. *Id.* ..... 756, 761

STENOGRAPHER'S RECEIPT—See COSTS, 11.

STOCK—See RAILROADS; TRESPASS AND TRESPASSERS.

STOCKS AND STOCKHOLDERS—See CORPORATIONS.

STREET RAILWAYS—See PERSONAL INJURIES, 47.

STREETS AND ALLEYS—See CITIES AND CITY OFFICERS, 3.

SUBROGATION—See MORTGAGES.

SUFFRAGE—See ELECTIONS.

SUMMONS—See PROCESS.

SUPPLEMENTAL PETITION—See PLEADINGS.

SUPREME COURT—See PRACTICE, SUPREME COURT.

SURETYSHIP AND GUARANTY:

1. **Action against deceased guardian's surety.**—A settlement of a deceased guardian's accounts in the probate court held not a condition precedent to an action for conversion in the district court against the surety on his bond and his administrator. *Mitchell v. Kelly*..... 1
2. **Appeal bond—signature of sureties.**—Signers of an affidavit indorsed on an appeal bond who described themselves as sureties held to have executed the bond, although their signatures were not otherwise attached to it. *Elliott v. Bellevue*..... 78
3. ——— An appeal bond signed only by the principal is not a nullity, and may be amended by adding signatures of sureties after the statutory time for executing the bond has expired. *Id.*..... 79
4. **Appearance bond.**—Where one charged with a misdemeanor is released on bond, and at the time set for trial appears by attorney only, it is within the discretion of the justice of the peace to proceed with the trial or to forfeit the bond. *The State v. Johnson*... 450
5. **Contribution.**—Payment two days before maturity of the note of an insolvent principal by a surety did not relieve the other surety from contribution. *Hotham v. Berry* ..... 412
6. ——— Where a surety furnished to another money to pay the note, and the latter exchanged the money for the check of a third party and with such check paid the note, the manner of payment did not release plaintiff's cosurety from contribution. *Id.*..... 412
7. **Mutual insurance guaranty fund.**—The statute authorizing certain mutual insurance companies to establish a guaranty fund does not permit the assessment of premium notes directly for such purposes. *Smith v. Insurance Co.*..... 697, 701
8. **Receiver's bond.**—The failure of a receiver to pay over money in his hands, as directed by the court, constituted a breach of his bond, for which he and his surety were liable. *Bank v. Varner*..... 692, 695

63—82 KAN.

**SURETYSHIP AND GUARANTY—CONTINUED:**

9. ——— The finding and order of the court as to payment and distribution of the fund, made in the action in which a receiver was appointed, was evidence against a surety to show a breach of the conditions of the receiver's bond. *Id.*.....692, 695

**SURFACE WATER**—See **WATERS AND WATERCOURSES**.

**SURPLUSAGE**—See **PLEADINGS**.

**T.****TAXATION:**

Cost of street improvement—assessments.—See **CITIES AND CITY OFFICERS**, 3, 4.

County high schools.—See **SCHOOLS AND SCHOOL LAND**.

Improvement of country roads.—See **HIGHWAYS**, 13-15.

Limitation—municipal bonds.—See **CITIES AND CITY OFFICERS**, 6.

1. **Acquisition of tax title by a tenant.**—Where the holder of a tax certificate acquired possession by lease and paid the contract rental he was not obligated to pay taxes nor estopped from acquiring a tax title. *Yurann v. Hamilton* .....528, 531
2. **Compromise.**—(See, also, Nos. 13, 57, 60, 62, 65, 69, 70.) The claim that a compromise tax deed was void because taxes not a lien upon the land were included not sustained. *King v. Nilson*..... 354
3. ——— A claim that a compromise resolution had become dormant when the money was paid and the assignment executed not sustained, the presumption being that the order was made without any condition requiring it to be accepted within a certain time. *Id.*... 354
4. ——— A compromise deed was not void because only part of the delinquent taxes were remitted. *Van Hall v. Goertz* .....142, 143
5. ——— A finding that a compromise tax deed was valid sustained. *Wood v. Cross*..... 215
6. **Constitutionality.**—The statute known as the "rock road law" is not unconstitutional on the ground that it delegates legislative power to the petitioners. *Hill v. Johnson County*.....813, 816
7. ——— Nor for the reason that the act contains no express provision for notice to property owners before the special assessments become a tax upon their property. *Id.*.....813, 819
8. ——— The resident owner of stock in a corporation organized and having its principal office in another state is required to list his stock for taxation, although all of the capital of such corporation is invested in property which is taxed in this state. *Hunt v. Allen County*..... 824
9. ——— Such taxation of such stock is not double taxation, and the statute authorizing it does not violate the constitutional provision for a uniform and equal rate of assessment and taxation. *Id.*..... 825
10. ——— The statute authorizing municipalities to issue bonds in aid of railroads is not repugnant to the con-

**TAXATION—CONTINUED:**

- stitutional prohibition against the state's being a party in carrying on works of internal improvement. *Railroad Co. v. Nation*.....345, 346
11. Corporate stock—owner.—See Nos. 8, 9.
12. Creditors of landowner enjoined from interfering—purchase of tax certificate.—Where a receiver was appointed for a corporation and interference with the property by creditors was enjoined the purchaser of a tax certificate did not become a creditor and was not barred from acquiring a tax deed. *Yurann v. Hamilton* .....528, 532
13. Disposition of unredeemed land by a county.—(See, also, No. 65.) Where a county adopts the provisions of chapter 162, Laws 1891, and purchases land at tax sale, which remains unredeemed for three years, the commissioners may dispose of it for less than the legal charges, or it may be conveyed to anyone paying the legal charges, without the intervention of the commissioners. *Gibson v. Branstool*..... 59
14. Equalization and valuation.—The decision of the tax commission equalizing the assessment of property is final when honestly, although erroneously made. *Salt Co. v. Ellsworth County*.....203, 205
15. ——— If an assessment is fraudulently made, or is so out of proportion to the actual value as to give reasonable assurance of a dishonest valuation, the enforcement of the tax may be enjoined. *Id.*..... 205
16. ——— The fact that the commission does not obtain the best evidence of value or adopt the best plan in estimating the value does not entitle plaintiff to an injunction. *Id.*..... 206
17. ——— A petition to enjoin the collection of a tax which charged that the commission knowingly fixed an exorbitant and grossly excessive valuation on plaintiff's property was not demurrable. *Id.*.....203, 205
18. ——— Plaintiff is not entitled to enjoin a tax because his property was valued higher than similar property, if the valuation be not excessive. *Id.*..... 206
19. ——— The officers are not required to value land containing salt deposits as if it were agricultural land, nor by the quantity of salt mined during the preceding year. *Id.*.....?..... 206
20. ——— The commission may avail itself of any information it can obtain that will enable it to make a just estimate of the actual value. *Id.*..... 206
21. Injunction.—See Nos. 15-18.
22. Irregularities in entering property on tax roll.—See No. 31.
23. Judicial notice of a levy.—A court may take judicial notice of a tax levied by the board of commissioners of the county in which the court is held upon all the taxable property in the county. *School District v. Wilson County*.....806, 810

## TAXATION—CONTINUED:

24. **Levy and assessment.**—(See, also, Nos. 6, 7, 15-20, 23, 38, 59, 73.) A tract of platted ground in a city held to constitute a "block" under the statute relating to assessments for the cost of street improvements, although the donor divided the tract by an alley and designated each portion a block. *Bowlus v. Iola*..... 774
25. ——— The fact that in previous similar cases the city acted upon a misinterpretation of the statute in assessing street improvements does not estop it from now proceeding according to law. *Id.*..... 774
26. ——— The duty of county commissioners to make a tax levy for the maintenance of high schools under the "Barnes law" stated.  
*Board of Education v. Allen County*..... 782  
*School District v. Wilson County*..... 806
27. ——— The power of the county commissioners under the act of 1905 to levy taxes for the support of high schools is superseded by enactments of 1907 and 1909. *Board of Education v. Allen County*..... 786
28. ——— The statutory provision for submitting to voters the question of an increased levy for high-school purposes is permissive, and failure to adopt this method is not a matter of estoppel in an action to compel the county board to make a levy within the statutory limitations. *Id.*..... 786
29. ——— Failure to publish estimates of expenditures upon which tax levies were made and failure to advertise for bids for the repair of a bridge held not neglect of duty warranting the removal of a commissioner from office. *The State v. Kennedy*.... 375, 385
30. ——— The decision of the tax commission equalizing the assessment of property is final when honestly, although erroneously made. *Salt Co. v. Ellsworth County* ..... 203, 205
31. **Lien for taxes.**—Irregularities of the county clerk and the treasurer in making entries upon the tax rolls did not defeat the right of the purchaser of a void tax deed to a lien for taxes. *Doty v. Maddux*... 416
32. ——— The claim that a compromise tax deed was void because taxes not a lien upon the land were included not sustained. *King v. Nilson*..... 354
33. **Mandamus.**—See Nos. 26, 28.
34. **Notice to property owners.**—See No. 7.
35. **Redemption.**—(See, also, Nos. 13, 59, 63, 65, 68, 69.) The right of a landowner to redeem from a tax sale during his minority and one year thereafter is not hindered by the statute requiring suit to avoid a conveyance for taxes, except in certain cases, to be commenced within five years after the tax deed is recorded. *Hulsman v. Deal*..... 518
36. **Sale to the best bidder.**—A claim that a tax deed failed to show with certainty that the land was sold to the best bidder at the tax sale not sustained. *LeCompte v. Smith* ..... 543

## TAXATION—CONTINUED:

37. **Separate tracts.**—See Nos. 60, 62, 69.
38. **Tax rolls—evidence of ownership.**—The tax rolls held *prima facie* evidence that the person in whose name land was assessed was the owner in an action to annul a tax deed issued to him. *Matthewson v. Hevel* ..... 136
39. **Tax roll—notice to purchasers.**—A tax roll affords notice to certain purchasers that the person designated thereon is owner of the premises. *Id.* ..... 135
40. **Tax title.**—(See, also, Nos. 1, 12, 13, 31, 35; QUIETING TITLE, 7.) Where the grantee was dead when a tax deed was executed and delivered to his heir, who recorded it and paid taxes but never took actual possession, the heir could not quiet title against, or enjoin, one in possession under the government title. *Baker v. Lane* ..... 715
41. — The words "his heirs and assigns," following the name of the grantee in the deed, did not vest title in the heir, and the deed was void. *Id.* ..... 715
42. — Where the grantee was dead when a tax deed was executed the heir could not maintain an equitable action to have the deed reformed by the substitution of her own name as grantee; but she might have obtained a new deed to herself as grantee, upon due application to the county clerk. *Id.* ..... 715
43. — The statute providing that a purchaser in good faith, without knowledge of a will, deriving title from heirs of a nonresident, shall not be defeated by production of the will unless it is offered for record within two years of the final probate does not protect a tax-deed holder. *Harris v. Defenbaugh* ..... 765, 768
44. — The doctrine of laches is never invoked in aid of a party where the equities are not in his favor. *Id.* ..... 766, 771
45. — There are no equities in favor of a tax-deed holder as against the owner of land. The rights of a tax-title holder are purely statutory. *Id.* ..... 766, 771
46. — Laches can not be imputed to the owner of land for failure to begin an action to annul a tax deed, where the tax-title holder is not in adverse possession. *Id.* ..... 766, 771
47. — A tax deed purporting to convey separate tracts of land and failing to state the amount for which each tract was conveyed held defective on its face. *Id.* ..... 768
48. — Where the legal owner sues to quiet title against the holder of a defective tax deed less than five years old laches is not a defense because plaintiff failed to pay taxes or to record his title papers or take possession until defendant acquired his rights. *Id.* ..... 766, 773
49. — The claim that a compromise tax deed was void because taxes not a lien upon the land were included not sustained. *King v. Nilson* ..... 354

## TAXATION—CONTINUED:

50. ——— A claim that a compromise resolution had become dormant when the money was paid and the assignment executed not sustained, the presumption being that the order was made without any condition requiring it to be accepted within a certain time. *Id.* ..... 354
51. ——— A decree quieting title, rendered upon publication service and without actual notice, can not after three years be set aside as fraudulent merely by showing that plaintiff's title was based solely upon a defective tax deed. *Wagner v. Beadle*..... 469
52. ——— A judgment quieting title held not void, although based on a tax deed void on its face. *Smith v. Land Co.*..... 539
53. ——— A tax deed was not void on its face because it did not sufficiently state the amount for which each of several tracts was conveyed. *LeCompte v. Smith* ..... 543
54. ——— A claim that a tax deed failed to show with certainty that the land was sold to the best bidder at the tax sale not sustained. *Id.*..... 543
55. ——— The recitals of a deed conveying several tracts were sufficient to show that the treasurer issued a separate certificate of purchase for each tract sold. *Id.*..... 543
56. ——— The payment of subsequent taxes was no part of the consideration for which a tax deed was made. *Id.*..... 544
57. ——— A compromise tax deed held good on its face although it showed one year's tax on several disconnected tracts was paid after the certificate issued, without reciting how much accrued on each tract, the presumption being that the proportion shown by the original sale continued. *Investment Co v. Andrew* ..... 550
58. ——— The holder of a tax deed was concluded by his admission of ownership of the property when the deed was issued. *Matthewson v. Hevel*..... 135
59. ——— Where portions of a lot belonging to different owners are taxed and sold as one tract a tax deed to one of the owners operates as a redemption of the entire tract. *Id.*..... 134
60. ——— A compromise deed conveying several tracts was not void because it did not specifically state the amount for which each tract was assigned or conveyed, the amount being ascertainable from the face of the deed. *Van Hall v. Goertz*.....142, 144
61. ——— A compromise deed was not void because only part of the delinquent taxes were remitted. *Id.*...142, 143
62. ——— Recitals in a compromise deed conveying several tracts held not to depart materially from the statutory requirements. *Id.*.....142, 146
63. ——— A tax deed was not void because in reciting the consideration for the assignment of the certificate

**TAXATION—CONTINUED:**

- it named the selling price, the other recitals, liberally construed, showing the assignment was made for an amount equal to the cost of redemption. *Milburn v. Beatty* ..... 207
64. — A finding that a compromise tax deed was valid sustained. *Wood v. Cross*..... 215
65. — Where land purchased by a county at tax sale is not redeemed for three years and is disposed of for less than the legal charges six months must intervene between the date of the assignment of the certificate and the execution of the deed, but not otherwise. *Gibson v. Branstool*..... 59
66. — Where a tax deed was issued the day the certificate was assigned the deed was not void because the selling price and the amount of the subsequent taxes were separately stated, instead of following the statutory form. *Id.*.....59, 63
67. — Where the consideration for a tax deed was five cents less than the legal charges the discrepancy was trivial and the deed was not void. *Id.*..... 63
68. — A tax deed which did not in terms state the sale price paid by the county and which misstated the cost of redemption, which was the consideration for the assignment of the certificate, held not void on its face, the correct amounts being ascertainable from the data furnished, aided by presumptions. *Van Buskirk v. Lawrence*..... 76
69. — A compromise tax deed of contiguous lots that had been sold separately was not void because the consideration for which each lot was sold and conveyed was not given, nor because the compromise did not include the taxes of the year in which it was made. *Less v. Yeats*..... 105
70. — In construing a compromise tax deed recorded five years every reasonable presumption in favor of its validity must be indulged. *Id.*..... 107
71. — An abbreviated acknowledgment of the execution of a tax deed by the county clerk held sufficient. *Id.*.....105, 107
72. — The tax rolls held *prima facie* evidence that the person in whose name land was assessed was the owner in an action to annul a tax deed issued to him. *Matthewson v. Hevel*..... 136
73. **Townships.**—A statute authorizing the county board to tax one-fourth of the cost of improving a road to the township through which the road runs held not to conflict with existing provisions for raising taxes for township purposes. *Hill v. Johnson County*..813, 820

**TAX DEED**—See QUIETING TITLE, 7; TAXATION, 40-72.

**TELEGRAPH COMPANIES:**

1. **Negligent delivery of a telegram.**—In an action for the negligent delivery of a telegram the evidence held to warrant exemplary damages, and an award of \$700 held not excessive. *Hollingsworth v. Telegraph Co.*, 472



**TEMPORARY INJUNCTION**—See **INJUNCTION**.

**TENANCY IN COMMON**:

1. **Mechanic's lien**.—A lien created on a wife's undivided interest in real estate by her husband does not extend to the shares of her cotenants, and after the lien has been perfected she may purchase and hold such shares unencumbered by it. *Garrett v. Loftus* ..... 556, 560

**TENANT**—See **LANDLORD AND TENANT**.

**TENDER**—See **ACTIONS AND REMEDIES**, 7; **DEEDS**, 4; **COSTS**, 1.

**TIME**:

- Acceptance of tax compromise resolution.—See **TAXATION**, 2.
- Accrual of action.—See **ACTIONS AND REMEDIES**; **CONTRACTS**, 1, 8-10; **COSTS**, 6; **LIMITATION OF ACTIONS**, 2-7; **RAILROADS**, 28-30.
- Advertisements for bids.—See **COUNTIES**, 16.
- After-acquired property.—See **MECHANIC'S LIEN**, 1.
- Age of affidavit when order for publication service is procured.—See **JUDGMENTS**, 2.
- Amendment of appeal bond.—See **BONDS**, 1.
- Amendment of information.—See **CRIMINAL LAW**, 14.
- Amendment of pleadings.—See **PLEADINGS**, 11.
- Bill of exceptions.—See **EVIDENCE**, 6; **PRACTICE, DISTRICT COURT**, 11.
- Case-made.—See **PRACTICE, SUPREME COURT**, 31.
- Entering property on tax roll.—See **TAXATION**, 31.
- Execution of chattel mortgage.—See **BANKRUPTCY**, 2.
- Execution of tax deed.—See **TAXATION**, 65, 66.
- Filing statement of costs.—See **PRACTICE, SUPREME COURT**, 5.
- Forfeiture.—See **SCHOOLS AND SCHOOL LAND**, 15, 16.
- Injury to growing crops.—See **DAMAGES**, 14, 15.
- Issuance of policy.—See **INSURANCE**, 7.
- Issuance of stock.—See **CORPORATIONS**, 11.
- Laches.—See **ACTIONS AND REMEDIES**.
- Loss of time.—See **DAMAGES**, 31, 32.
- Memory of a witness.—See **EVIDENCE**, 56.
- Notice of defect in county bridges.—See **HIGHWAYS**, 8-10.
- Notice of injury and claim for damages.—See **PERSONAL INJURIES**.
- Notice to purchaser—fraud.—See **JUDGMENTS**, 15.
- Payment for part performed—severable contract.—See **CONTRACTS**, 1, 71.
- Payment of debt by a surety before maturity.—See **SURETSHIP AND GUARANTY**, 5.
- Payment of premium.—See **INSURANCE**, 7.
- Payment of receiver.—See **FEES AND SALARIES**, 7.
- Perfecting title.—See **SALES**, 2.
- Performance of contract.—See **CONTRACTS**, 76.
- Permanent injuries.—See **PERSONAL INJURIES**, 60, 61, 68.
- Proof of death—seven years' unexplained absence.—See **INSURANCE**, 19.
- Reasonable time.—See **SALES**, 2; **SCHOOLS AND SCHOOL LAND**, 20.
- Recording will of nonresident.—See **WILLS**, 19, 20.
- Redemption—foreclosure of purchase-money lien.—See **JUDICIAL SALES**, 4.
- Redemption from tax sale.—See **TAXATION**.
- Rendition of a judgment.—See **JUDGMENTS**.
- Statements by defendant showing malice.—See **DAMAGES**, 22.
- Statute of limitations.—See **LIMITATION OF ACTIONS**.
- Vacation of a judgment.—See **JUDGMENTS**.

**TITLE AND OWNERSHIP**:

- See **BANKRUPTCY**; **DEEDS**; **EVIDENCE**, 4, 30, 72; **JUDICIAL SALES**; **NEGOTIABLE INSTRUMENTS**, 1; **QUIETING TITLE**; **SALES**; **SCHOOLS AND SCHOOL LAND**; **TAXATION**; **TRADE-MARKS**; **WILLS**.
- Abstract of title.—See **SALES**.
- Abutting owner.—See **CITIES AND CITY OFFICERS**, 14.
- Adverse possession.—See **ACTIONS AND REMEDIES**, 26.
- After-acquired property.—See **MECHANIC'S LIEN**, 1.
- Assignment.—See **CONTRACTS**, 5, 6, 72; **INSURANCE**; **PARTIES**; **SCHOOLS AND SCHOOL LAND**; **TAXATION**, 13, 66.

**TITLE AND OWNERSHIP—CONTINUED:**

Burden of proof.—See **NEGOTIABLE INSTRUMENTS**, 4.  
 Chattel mortgages.—See **MORTGAGES**.  
 Condemnation proceedings.—See **HIGHWAYS**, 1.  
 Doubtful or unmarketable title.—See **SPECIFIC PERFORMANCE**.  
 Execution sale of equitable interest.—See **JUDICIAL SALES**, 1, 2.  
 Fees of officers.—See **FEES AND SALARIES**, 3.  
 Improvements.—See **SCHOOLS AND SCHOOL LAND**, 19.  
 Jury trial.—See **JURY AND JURORS**, 2-4.  
 Laches.—See **ACTIONS AND REMEDIES**.  
*Lis pendens*.—See **LANDLORD AND TENANT**, 4, 5.  
 Married women.—See **HUSBAND AND WIFE**, 3.  
 Notice to purchaser.—See **SALES**.  
 Office.—See **OFFICE AND OFFICERS**, 9; **QUO WARRANTO**, 7.  
 Quitclaim deed.—See **DEEDS**.  
 Reversion.—See **BANKRUPTCY**, 1.  
 Shade trees growing in public streets.—See **CITIES AND CITY OFFICERS**, 14.  
 Subrogation.—See **MORTGAGES**, 18.  
 Tax title.—See **TAXATION**.  
 Tenants in common.—See **MECHANIC'S LIEN**, 1.

**TITLE OF AN ACT**—See **CONSTITUTIONAL LAW**.

**TORNADO INSURANCE**—See **INSURANCE**, 13-16.

**TOWNSHIPS**—See **TAXATION**, 73; **HIGHWAYS**, 11; **ELECTIONS**, 4.

**TRADE-MARKS:**

1. **Injunction**.—A manufacturer who, to designate his goods, has adopted a name or device not subject to appropriation as a trade-mark may be still protected in its use from unfair competition if the circumstances warrant it. *Mill Co. v. Kramer*..... 684
2. **Right to use one's own name**.—A person is not prohibited from using his own name as a trade-mark to articles he manufactures because it has first been rightfully so used by another, but such person may not by any artifice induce purchasers to believe that his articles so marked are the products of the other. *Id.*..... 679

**TRANSCRIPT OF THE RECORD**—See **PRACTICE**, **SUPREME COURT**.

**TRANSPORTATION**—See **RAILROADS**.

**TREES**—See **CITIES AND CITY OFFICERS**, 14.

**TRESPASS AND TRESPASSERS:**

1. **Injunction**.—A tax-deed holder held not entitled to an injunction against defendants holding possession under the government title. *Baker v. Lane*..... 715, 719
2. **Injury by a mob**.—See **CITIES AND CITY OFFICERS**.
3. **Injury by trespassing animals**.—An oral agreement by adjoining landowners that each should maintain one-half of a division fence held enforceable. *McAfee v. Walker*..... 182, 183
4. ——— One who failed to keep up a portion of a division fence in accordance with an agreement could not recover for injury by trespassing animals under the statute forbidding the owner of such animals to permit them to run at large. *Id.*..... 182, 184

## TRESPASS AND TRESPASSERS—CONTINUED:

5. ——— The distinction between failing to “confine” animals and permitting them to “run at large” discussed. *Id.*..... 185
6. Occupant of land under oral contract of sale.—One who takes possession of land under an oral contract to purchase is not a trespasser in fact, and specific performance is not necessary to protect him from liability as such. *Baldrige v. Centgraf*..... 244

TRIAL—See EVIDENCE; INSTRUCTIONS; JURY AND JURORS;  
NEW TRIAL; PLEADINGS; PRACTICE, DISTRICT COURT.

TROVER AND CONVERSION—See CONVERSION.

## TRUSTS AND TRUSTEES:

See BANKRUPTCY; WILLS, 10.

1. Action at law by beneficiary.—Where the contract which created a trust compels a beneficiary to rely upon the trustee’s personal liability, the beneficiary may maintain an action at law against the trustee or his administrator to recover a debt matured by the terms of the contract. *O’Neil v. Epting*..... 245

## U.

ULTRA VIRES—See CORPORATIONS.

UMPIRE—See INSURANCE, 2, 3.

UNDUE INFLUENCE—See DEEDS; WILLS.

UNKNOWN HEIRS—See PROCESS, 13, 14.

## V.

VACATION—See JUDGMENTS.

VALUE—See ATTORNEYS, 2; DAMAGES, 14, 15; REPLEVIN, 8;  
SCHOOLS AND SCHOOL LAND, 1; TAXATION, 14-20.

VARIANCE—See PLEADINGS, 3.

VENDOR AND PURCHASER—See SALES; SCHOOLS AND  
SCHOOL LAND.

## VENUE:

1. Action for alimony.—The plaintiff in a suit for alimony need not be a resident of the state or of any county of the state. *McCormick v. McCormick*....31, 52
2. ——— The suit may be commenced in any county where defendant may be summoned, or where he has property subject to appropriation to pay the judgment if he be a nonresident. *Id.*.....31, 52

## VERDICT:

Admonition urging agreement.—See PRACTICE, DISTRICT COURT.  
Amount of award.—See COSTS, 2; DAMAGES, 18-21.  
Award for injuries not proved.—See DAMAGES, 25.  
Conclusiveness of findings.—See PRACTICE, SUPREME COURT.  
Consideration by the jury of matters not in evidence.—See JURY  
AND JURORS, 1.  
Contrary to the evidence.—See NEW TRIAL.  
Findings included in general verdict.—See JUDGMENTS, 12; JURY  
AND JURORS, 12.

**VERDICT—CONTINUED:**

- Finding of fact—presumption.—See EVIDENCE, 23, 48.
- Instructed.—See INSTRUCTIONS.
- Physical facts demonstrating that evidence is false.—See PRACTICE, SUPREME COURT, 37, 38.
- Special findings.—See JURY AND JURORS.

**VERIFICATION—See COUNTIES, 11.**

**VESTED RIGHTS—See CONSTITUTIONAL LAW.**

**VOTERS—See ELECTIONS.**

**W.**

**WAIVER:**

- Abstract of title.—See SALES, 6-9.
- Accusation.—See CONTEMPT.
- Appraisalment.—See INSURANCE, 3.
- Condition of contract.—See CONTRACTS; SALES, 17; INSURANCE, 3, 23, 24.
- Conversion.—See CONVERSION, 3.
- Erroneous denial of new trial—refusal to specify errors.—See NEW TRIAL.
- Instructions.—See INSTRUCTIONS.
- Jurisdiction—proceeding to vacate judgment.—See JURISDICTION.
- Notice of claim for injuries.—See PERSONAL INJURIES, 63, 65.
- Pleadings.—See PLEADINGS.
- Statute of limitations.—See LIMITATION OF ACTIONS.

**WARD—See GUARDIAN AND WARD.**

**WARRANT—See CRIMINAL LAW, 21; FALSE IMPRISONMENT, 1.**

**WARRANTIES—See CONTRACTS, 83, 84; SALES, 41, 42.**

**WATERS AND WATERCOURSES:**

1. **Obstruction of a stream—injury to riparian owner.**—An allegation that defendant in laying its tracks over a stream and adjacent lowland negligently omitted to provide an outlet for water overflowing the banks during floods that were to have been anticipated, thus causing injury to plaintiff's land, stated a cause of action. *Roland v. Railway Co.*..... 546

**WIFE—See HUSBAND AND WIFE.**

**WILLS:**

1. **Alteration or Mutilation.**—See Nos. 22-24.
2. **Cancellation of deed fraudulently procured from a testator.**—An action by a devisee of a valid will to cancel a deed the testator was fraudulently procured to execute when he was of unsound mind is equitable in character, and neither party is entitled to a jury trial. *Hospital Co. v. Philippi*.....64, 68
3. ——— Where, before a will was probated, a devisee sued to cancel a deed executed by the testator, but after probate filed an amended and supplemental petition, on which the cause was tried, an objection that the action was prematurely brought became immaterial. *Id.*.....64, 68
4. ——— A deed void because the grantee knew of the grantor's insanity and paid only a nominal consideration did not revoke a will previously made by the grantor, and a devisee under the will had sufficient interest to maintain an action to cancel the deed, al-

## WILLS—CONTINUED:

- though there had been no disaffirmance of the deed or tender of the consideration paid by the grantee. *Id.* ..... 64, 68
5. **Construction.**—(See, also, No. 21.) In construing a will the meaning of the words used will be expanded or restricted so as best to express the purpose and intent of the testator. *Blair v. Blair*..... 464
6. ——— Where one part of a will clearly indicates a disposition to create an estate in fee it will not be restricted to any less estate by subsequent vague or doubtful expressions. *Holt v. Wilson*..... 268
7. ——— Rules for the construction of wills stated and discussed. *Id.*..... 268.
8. ——— Punctuation is not to be regarded if any change therein will render the meaning of the instrument more obvious. *Id.*..... 269.
9. **Draftsman a beneficiary and a relative.**—The fact that a will was written by the testator's daughter, who was named as a beneficiary, did not raise a presumption of undue influence. *Sellards v. Kirby*..291, 294.
10. ——— Nor did it make a case for the application of the statutory provision that a will written by a principal beneficiary and confidential agent can not be held valid unless it be affirmatively shown that the testator knew its contents and had independent advice. *Id.* .....291, 296.
11. **Identification—separate sheets of paper.**—The connection of the subject matter of separate sheets of paper, the last one being signed, was sufficient to establish *prima facie* the identity of the other sheets as parts of a will. *Id.*.....291, 298.
12. **Independent advice—knowledge of contents.**—See Nos. 9, 10.
13. **Nonresident.**—See Nos. 19, 20.
14. **Probate.**—See Nos. 3, 9-11, 22, 28.
15. **Provision for widow—amount “required for support and maintenance.”**—Where a will makes provision for the “support and maintenance of the widow” the quoted words will be given a broad significance if there be no language limiting their meaning. *Blair v. Blair*..... 464.
16. ——— A provision that the widow might draw from the estate all money “required” for her support and maintenance interpreted to mean, not the amount necessary, but such amount as she might wish to use for support and maintenance. *Id.*..... 465.
17. **Provision for widow—diversion of the fund.**—The provision made by a testator for the support and maintenance of his widow can not be used for a purpose wholly foreign to her maintenance or personal expenses. *Id.*..... 464.
18. **Punctuation.**—See No. 8.
19. **Record.**—(See, also, ACTIONS AND REMEDIES, 27.) The statute providing that a purchaser in good faith,

**WILLS—CONTINUED:**

- without knowledge of a will, deriving title from heirs of a nonresident, shall not be defeated by production of the will unless it is offered for record within two years of the final probate does not protect a tax-deed holder. *Harris v. Defenbaugh*.....765, 768
20. ——— In order to bring himself within its protection he must be a purchaser in good faith and have acquired from the testator or the heirs or devisees of the testator. *Id.*.....765, 768
21. **Repugnant provisions.**—(See, also, No. 6.) A devise of an estate in fee was not cut down to a life estate with a vested remainder by subsequent language. *Holt v. Wilson*..... 268
22. **Revocation.**—(See, also, No. 4.) Where a testator signed a will below the attestation clause, but when offered for probate the signature had been partially erased and his name written above such clause, apparently by himself, the will was properly admitted to probate. *Sellards v. Kirby*.....292, 297
23. ——— Generally where a mutilated will is found among the testator's effects the presumption arises that the mutilation was his own act, done with a revoking purpose. *Id.*..... 298
24. ——— If a testator erase his signature, intending a revocation, a subsequent unattested signing could not revive the will. *Id.*..... 298
25. **Signature of testator.**—(See, also, No. 22.) The validity of a will is not affected because the testator's signature is below the attestation clause. *Id.*..... 300
26. ——— If a testator erase his signature, intending a revocation, a subsequent unattested signing could not revive the will. *Id.*..... 298
27. **Undue influence.**—See Nos. 9, 10.
28. **Witnesses to prove execution.**—(See, also, No. 26.) The statute making void a devise to a witness to a will which can not be proved without his testimony applies only to attesting witnesses. *Sellards v. Kirby* ..... 291, 293
29. **Words to convey a fee.**—Words that will devise an estate in fee stated. *Holt v. Wilson*..... 272

**WITNESSES:**

Cross-examination.—See EVIDENCE.  
 Interest of witness.—See EVIDENCE.  
 Intimidation.—See EVIDENCE, 47, 76.  
 Memory of a witness.—See EVIDENCE.  
 Opinions and conclusions.—See EVIDENCE.  
 Perjury.—See JUDGMENTS, 14, 18.  
 Privileged communications.—See EVIDENCE.  
 Self-incriminating testimony.—See CRIMINAL LAW.  
 Testimony by a witness as to his state of mind.—See EVIDENCE.  
 Testimony shown to be false by physical facts.—See PRACTICE, SUPREME COURT, 37, 38.  
 Transactions with persons since deceased.—See EVIDENCE.  
 Weight and credibility of testimony.—See EVIDENCE.  
 Wills.—See WILLS.

**WOMEN**—See ELECTIONS, 4.

## WORDS, PHRASES AND MAXIMS:

- "Adverse."—See PLEADINGS, 30.  
 "All my property."—See WILLS, 29.  
 "All persons interested or having an interest in the property."—See BONDS, 13.  
 "Another."—See ELECTIONS, 2.  
 "Any."—See PERSONAL INJURIES, 23.  
 "Be a party in carrying on any works of internal improvement."—See CONSTITUTIONAL LAW, 21.  
 "Block."—See CITIES AND CITY OFFICERS, 3.  
 "City courts."—See JURISDICTION, 3.  
 "City officers."—See CITIES AND CITY OFFICERS, 10.  
 "Confine."—See TRESPASS AND TRESPASSERS, 5.  
 "Contributory negligence."—See PERSONAL INJURIES, 5.  
 "Corruption."—See OFFICE AND OFFICERS, 15, 16.  
 "Creditors."—See TAXATION, 12.  
 "Damages."—See REPLEVIN, 2.  
 "Double-line rates."—See RAILROADS, 39.  
 "Doubtful title."—See SPECIFIC PERFORMANCE, 4.  
 "Encumbrance."—See INSURANCE, 20.  
 "Estate."—See CRIMINAL LAW, 4.  
 "Exercise ordinary care."—See PERSONAL INJURIES, 42.  
 "For lands for right of way, depot grounds and terminal facilities."—See CITIES AND CITY OFFICERS, 3, 9.  
 "Fraud practiced by the successful party."—See JUDGMENTS, 8.  
 "Heirs."—See PROCESS, 13.  
 "His heirs or assigns."—See TAXATION, 41.  
 "Indebtedness shall be deemed insecure."—See REPLEVIN, 11.  
 "Injury to the person."—See PERSONAL INJURIES, 60, 61.  
 "Irregularity."—See JUDGMENTS, 46.  
 "Know."—See PERSONAL INJURIES, 36.  
 "Last clear chance."—See PERSONAL INJURIES, 6.  
 "Manufacture and sale."—See INTOXICATING LIQUORS, 2.  
 "Manufacturing establishment."—See PERSONAL INJURIES, 30.  
 "Moneyed corporation."—See CRIMINAL LAW, 7.  
 "Neglect of official duty."—See OFFICE AND OFFICERS, 21, 22.  
 "No person bid."—See TAXATION, 5.  
 "Or after."—See WILLS, 21.  
 "Prejudicial."—See PLEADINGS, 30.  
 "Purchaser."—See SCHOOLS AND SCHOOL LAND, 11.  
 "Qualified voters."—See ELECTIONS, 4.  
 "Required."—See WILLS, 16.  
*Res judicata.*—See JUDGMENTS.  
*Respondent superior.*—See CITIES AND CITY OFFICERS, 12, 13.  
 "Running at large."—See TRESPASS AND TRESPASSERS, 5.  
 "Said property could not be sold."—See TAXATION, 64.  
 "Sale after six months."—See JUDGMENTS, 35.  
 "Second."—See ELECTIONS, 2.  
 "Single-line rates."—See RAILROADS, 39.  
 "Support and maintenance."—See WILLS, 15.  
 "The residue of my estate."—See WILLS, 29.  
 "The rest."—See WILLS, 29.  
 "*Ultra vires.*"—See CORPORATIONS.  
 "Unavoidable accident."—See RAILROADS, 16.  
 "Unknown heirs."—See PROCESS, 13.  
 "Unlawful intent."—See CRIMINAL LAW, 11.  
 "Unmarketable title."—See SPECIFIC PERFORMANCE, 4.  
 "Usual and ordinary caution."—See CRIMINAL LAW, 11.  
 "With due diligence."—See PROCESS, 7.  
 "Witness to the will."—See WILLS, 28.

## WRITINGS:

- Acknowledgment of execution.—See OFFICE AND OFFICERS.  
 Alteration or mutilation.—See NEGOTIABLE INSTRUMENTS; WILLS.  
 Cancellation.—See CONTRACTS, 34, 35, 70; DEEDS.  
 Consent of mortgagee of chattels.—See SALES, 25.  
 Construction.—See CONTRACTS; WILLS.  
 Evidence.—See PRACTICE, SUPREME COURT, 12.  
 Identification—separate sheets of paper.—See WILLS.  
 Memorandum.—See SPECIFIC PERFORMANCE, 1, 2.  
 Notice of claim for injuries.—See PERSONAL INJURIES.  
 Parol or extrinsic evidence.—See EVIDENCE.  
 Reformation.—See CONTRACTS; TAXATION, 42.  
 Renewal contract.—See INSURANCE.  
 Signature.—See BONDS, 1, 2; CONTRACTS, 4, 5, 72; CRIMINAL LAW, 9, 10; PLEADINGS, 11; WILLS, 22, 25, 26.  
 Statute of frauds.—See FRAUD; SPECIFIC PERFORMANCE.









